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Docket Number_____

UNITED STATES SUPREME COURT
October Term 1995

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND AS A TRUSTEE FOR GEORGE W. HOLDER, JR.,

Petitioner,

Vs.

MANIER, HEROD, HOLLABAUGH & SMITH, a professional corporation, C. KINIAN COSNER, JR., and H. ROWAN LEATHERS, III,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

Petition for Writ of Certiorari

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1. Questions Presented for Review.

The Tennessee Supreme Court ruled that a Chapter 11 Bankruptcy Trustee's assignment of a Debtor's pre-petition legal malpractice claim, approved by final Bankruptcy Court Order pursuant to a confirmed plan of confirmation, was invalid due to a first-impression holding that Tennessee state law prohibits the assignment of legal malpractice claims, and ordered the assignee's action on the assigned claim to be dismissed. Accordingly, the issues presented for review are:

A. Whether a Bankruptcy Trustee May Assign a Debtor's Pre-Petition Legal Malpractice Claim Notwithstanding State Law:

1. Whether a Pre-Petition Legal Malpractice Claim is Property of the Estate in Bankruptcy.

2. Whether a Bankruptcy Trustee has a right to assign a legal malpractice claim that is property of the estate, pursuant to a confirmed plan of liquidation.

B. Whether Final Bankruptcy Court Orders must be given full faith and credit in state courts.

C. Whether the retroactive application a first-impression pronouncement of law violates due process.

List of Parties to the Proceeding:

Petitioner, the Can-Do Inc. Pension and Profit Sharing Plan and Successor Plans, individually and as a Trustee for George W. Holder, Jr., Plaintiff-Appellee. The Successor plan is known as the Horizon Pension and Profit Sharing Plan.

Respondents are C. Kinian Cosner, Jr., Esq., H. Rowan Leathers, III, Esq., and Manier, Herod, Hollabaugh & Smith, a Tennessee Professional Corporation.

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28 U.S.C. 1257 (1994)	1

Statement of Jurisdiction

This Petition of Writ of Certiorari seeks a review and reversal of a final order of the Supreme Court of the State of Tennessee.

(i) Date of Judgment Sought to Be Reviewed. The Final Order of the Supreme Court of the State of Tennessee was rendered May 6, 1996.

(ii) Date of Order on Rehearing. No motion for rehearing was filed by either party.

(iii) Statutory Provision Conferring Jurisdiction. This Court has jurisdiction over this action pursuant to the provisions of 28 U.S.C. 1257 (1994) for the following reasons:

A. The ruling of the Tennessee Supreme Court draws into question three statutes of the United States, 11 U.S.C. 541 (1994), defining property of a bankruptcy estate, 11 U.S.C. 363 (1994), defining the powers and duties of a bankruptcy trustee to use, sale, or lease property of the estate, and 11 U.S.C. 1123 (1994) defining the Contents of a Plan.

B. The ruling of the Tennessee Supreme Court does not give full faith and credit to a final order of the United States Bankruptcy Court, and draws into question Article IV of the United States Constitution, requiring full faith and credit.

C. The ruling of the Tennessee Supreme Court states that it is a holding of first impression, but directs the dismissal of a case filed three years prior to the holding, violating due process under the Fourteenth Amendment to the United States Constitution.

D. Certiorari should be granted to reverse a ruling of the Supreme Court of Tennessee that bars a United States Bankruptcy Trustee from assigning a legal malpractice action that is property of the bankruptcy estate, pursuant to final order of the United States Bankruptcy Court and pursuant to an order confirming a liquidating plan of reorganization. This ruling:

1) Conflicts with decisions of a United States Court of Appeals, In re FCX, Inc., 853 F.2d 1149, 1155 (4th Cir. 1988) cert denied 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989), and

2) decides an important question of federal law governing the power of a bankruptcy trustee to assign legal malpractice causes of action, which should be settled by this Court, and

3) decides an important question of federal law governing the power of a bankruptcy trustee to assign legal malpractice causes of action in a way that conflicts with relevant decisions of this Court, Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed. 233 (1971).

4) Conflicts with decisions of this Court in retroactively applying first impression pronouncements of state law.

(iv) No Notification under Rule 29.4(b), Rules of the United States Supreme Court, is required, as this Petition does not draw into question the Constitutionality of any act of Congress.

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved in the Case

The following Constitutional Provisions and Statutes are set out in the appendix:

1. Article 4, Section 1
   United States Constitution — Appendix Page 2

2. Article 6
   United States Constitution — Appendix Page 3

3. Amendment 14
   United States Constitution — Appendix Page 4

4. 11 U.S.C. 363 (1994) — Appendix Pages 6-11

5. 11 U.S.C. 541 (1994) — Appendix Pages 12-14

6. 11 U.S.C. 1123 (1994) — Appendix Pages 15-17

Statement of the Case

On July 24, 1991, George W. Holder, Jr., a Tennessee resident, filed a voluntary Chapter 11 proceeding in the United States Bankruptcy Court for Tennessee, Nashville Division. Prior to the filing of this petition, he employed the Respondents, attorneys licensed to practice law in the State of Tennessee, for services involving a foreclosure proceeding. A default judgment was entered in the state court foreclosure proceeding, with a deficiency judgment in excess of $1,900,000.00. Thereafter, the Respondents, as attorneys for Mr. Holder, prepared and filed a Chapter 11 proceeding, and appeared as counsel for the Debtor. The Debtor operated as Debtor in Possession through November of 1991, and on November 13, 1991, William L. Newport was appointed as a Chapter 11 trustee. Following this appointment, Mr. Newport filed a Plan of Liquidation (Appendix 18-38), which provided, in pertinent part, " the Trustee shall liquidate all assets . . ." (Plan of Reorganization, Appendix 35). The Trustee' Plan of Liquidation was confirmed by order dated April 29, 1993.(Appendix 39).

During the bankruptcy proceeding, one of Mr. Holder's assets, a Tennessee Corporation known as Can-Do, Inc., was sold to third parties. However, Mr. Holder's interest in the Can-Do, Inc., Pension and Profit Sharing Plan was an exempt asset and remained as exempt property of Mr. Holder.

Mr. Holder believed that the Respondent attorneys had committed negligence and malpractice in the handling of his affairs. Accordingly, as the beneficiary of the Can-Do, Inc. Pension and Profit Sharing Plan, the beneficiary requested that this Pension and Profit Sharing Plan acquire the bankruptcy estate's interest in the legal malpractice action against his attorneys. Pursuant to the terms of the Order Confirming Plan (Appendix 39-41) , an Agreed Order between William L. Newport, as Trustee, and the Can-Do, Inc. Pension and Profit Sharing plan was entered, and approved by the

United States Bankruptcy Trustee, dated May 18, 1993 (Appendix 42-53). This Agreed Order of the United States Bankruptcy Court provides, at Appendix 48-49, that the trustee shall cause to be transferred to the Pension Fund the trustee's interest in, " . . . any cause of action or right of payment the bankruptcy estate may have against . . . C. Kinian Cosner, Jr. or Manier, Herod, Hollabaugh & Smith . . ." (Appendix 48-49).

On May 25, 1993, based on this assignment, The Can-Do Inc. Pension and Profit Sharing Plan, individually and as a Trustee for George W. Holder, Jr., filed a legal malpractice action in the state court of Tennessee.

The trial court dismissed the Complaint, on the reasoning that the assignment of a legal malpractice claim in Tennessee is void and invalid as against public policy. (Appendix 54).

The Court of Appeals of Tennessee, Middle Section at Nashville, reversed the trial court's dismissal, finding that a legal malpractice cause of action is assignable under Tennessee law. (Appendix 56).

On May 6, 1996, after granting Certiorari, the Tennessee Supreme Court reversed the Court of Appeals of Tennessee, and ordered the trial court's dismissal of the case reinstated, stating, "Because we have determined that the public policy of this State should prohibit the assignment of legal malpractice actions, the judgment of the Court of Appeals is reversed, and the judgment of the trial court dismissing this action is reinstated," Can Do, Inc. v. Manier Herod, 922 S.W.2d 865, 869-870 (Tenn. 1996). (Appendix 65).

First Instance Federal Question was raised, with pertinent quotations of specific portions of the record with specific reference to the places in the record where the matter appears:

In its opinion, the Supreme Court of Tennessee

(Appendix 65-74) states:

> The bankruptcy trustee, William L. Newport, transferred to the Can Do, Inc. Pension and Profit Sharing Plan certain assets, including an assignment of "any cause of action or right to payment the bankruptcy estate may have against the following . . . C. Kinian Cosner, Jr. and Manier, Herod Hollabaugh and Smith." Can Do, Inc. v. Manier Herod, 922 S.W.2d 865, 866 (Tenn. 1996) (Appendix 66).

The opinion of the Appellate Court, which was reversed by the Tennessee Supreme Court, states:

> The defendants had allegedly mismanaged the legal affairs of George W. Holder, Jr., driving him into bankruptcy and ruining him financially. As amended, the complaint filed in the chancery court also alleged that Horizon Pension and Profit Sharing Plan was the legal successor to Can Do, Inc. Profit Sharing Plan and Trust (Can Do, Inc.); that George W. Holder, Jr. Was the principal beneficiary of the plan; and that the trustee of George W. Holder, Jr.'s estate in bankruptcy had assigned to Can Do, Inc. any cause of action or right to payment the bankruptcy estate had against the law firm and the individual attorneys. Can Do, Inc. Pension and Profit Sharing Plan v. Manier, Herod Hollabaugh & Smith, P.C., Appeal No. 01-A-01-9404-CH-00200, Court of Appeals of Tennessee, Middle Section at Nashville, (Appendix Pg. 58).

Accordingly, the fact that the assignment was by a bankruptcy trustee was considered by all courts, including the Tennessee Supreme Court, in ruling that a bankruptcy trustee's assignment of a legal malpractice claim was invalid under the state law of Tennessee.

Argument Amplifying Reasons for Allowance of this Writ

The Order of the Tennessee Supreme Court rendering invalid an assignment of a legal malpractice claim by a bankruptcy trustee must be reversed. A pre-petition legal malpractice claim of a debtor is property of the estate defined by 11 U.S.C. 541 (1994). The trustee has the unrestricted power to sell or assign property of the estate as provided by 11 U.S.C. 363 (1994) and since this sale was pursuant to a confirmed plan of liquidation, such plans are effective notwithstanding contradictory nonbankruptcy law pursuant to 11 U.S.C. 1123 (1994). Under the supremacy clause, Article 6 of the United States Constitution, federal statutes are the highest law of the land and cannot be impaired by state law. Accordingly, it is clear that, regardless of state law, a bankruptcy trustee operating under a confirmed liquidating plan of reorganization, may assign a legal malpractice claim, and the Supreme Court of the Tennessee committed error when it determined that such an assignment was invalid.

In addition to the foregoing reasons, the Tennessee state courts are required to give full faith and credit to final orders of United States Bankruptcy Courts. The assignment was approved by final bankruptcy court order, and accordingly, state courts were powerless to later conclude that the assignment was invalid.

The Petitioner also contends that a first-impression pronouncement of state law, if applied retroactively, violates the due process clause of the Fourteenth Amendment to the United States Constitution.

If certiorari is not granted and this case remains of record, it explicitly holds that state law may impair the power of a bankruptcy trustee to assign property of the estate. This holding is incorrect, as a matter of law, and must be reversed in order to preclude confusion and incorrect rulings based on this precedent of the highest Court of the state of Tennessee. In addition, it expressly conflicts with In re FCX, Inc., 853 F.2d

1149, 1155 (4th Cir. 1988) cert denied 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989), and conflicts with the express provisions of 11 U.S.C. 1123 (1994). Accordingly, it is appropriate to accept jurisdiction over this case to resolve an important issue regarding the power of a bankruptcy trustee to assign a legal malpractice action.

Certiorari should be granted to reverse a ruling of the Supreme Court of Tennessee that bars a United States Bankruptcy Trustee from assigning a legal malpractice action that is property of the bankruptcy estate, pursuant to final order of the United States Bankruptcy Court and pursuant to an order confirming a liquidating plan of reorganization. This ruling:

1) Conflicts with decisions of a United States Court of Appeals, In re FCX, Inc., 853 F.2d 1149, 1155 (4th Cir. 1988) cert denied 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989), and

2) decides an important question of federal law governing the power of a bankruptcy trustee to assign legal malpractice causes of action, which should be settled by this Court, and

3) decides an important question of federal law governing the power of a bankruptcy trustee to assign legal malpractice causes of action in a way that conflicts with relevant decisions of this Court, Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed. 233 (1971).

4) Conflicts with decisions of this Court in retroactively applying first impression pronouncements of state law.

Argument

A. A Bankruptcy Trustee May Assign a Debtor's Pre-Petition Legal Malpractice Claim Notwithstanding State Law.

1. A Pre-Petition Legal Malpractice Claim is Property of the Estate in Bankruptcy.

Property of the estate is defined in 11 U.S.C. 541 (1994),

which states, in pertinent part, as follows:

> (a) . . . Such estate is composed of all the following property, wherever located and by whomever held:
> (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case
> (c)(1) . . . An interest of the debtor in property becomes property of the estate under subsection (a)(1) . . .of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law-
> (A) that restricts or conditions transfer of such interest by the debtor.

Accordingly, since subdivision (c)(1)(A) specifically provides that an interest of the debtor becomes property of the estate notwithstanding any provision in applicable nonbankruptcy law that restricts the transfer of such interest by the debtor, a legal malpractice claim that accrues pre-petition is property of the estate. For this reason, bankruptcy courts have generally held that legal malpractice claims are property of the estate, In Re Allen , 179 B.R. 818 (E.D.Tex. 1995), Haaland v. Corporate Management, Inc., 172 B.R. 74 (S.D.Cal. 1989). As clearly stated in 11 U.S.C. 541 (1994), state law restrictions on assignment or transfer of property do not prevent the property from becoming property of the estate. The statute specifically provides that property becomes property of the estate notwithstanding nonbankruptcy law restricting the transfer of the property.

11 U.S.C. 541 (1994) provides that all causes of action of a debtor are property of the estate, notwithstanding state law restrictions on transfer. For this reason, the legal malpractice claim of George W. Holder, Jr., against Mr. Cosner and his law firm, the respondents in this action, became property of the estate upon his filing a Chapter 11 proceeding.

2. A Bankruptcy Trustee has a right to assign a legal malpractice claim that is property of the estate.

The power of a bankruptcy trustee to use, sell, or assign property is governed by 11 U.S.C. 363 (1994). 11 U.S.C. 363(b)(1) (1994)provides, "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." The statue contains no restrictions on the trustees ability to sell property of the estate. In 11 U.S.C. 365(f) (1994), the trustee is prohibited from selling property free of interests of entities other than the estate only if applicable nonbankruptcy law permits the sale. Where there is property of the estate, the bankruptcy court may not recognize any state law restricting the liquidation of the debtor's property, In re Baquet, 61 B.R. 495 (D.Mont. 1986).

One case, In re Schauer, 835 F.2d 1222 (8th Cir. 1987), held that state court restrictions on asset transfers of the debtor also restricted the trustee's ability to transfer the assets. This opinion holds that state law defines the debtor's interest in property which becomes part of the bankruptcy estate, and therefore, if state law restricts the debtor's ability to transfer property, that restriction applies to the trustee.

However, Can Do, Inc., purchased the cause of action through a confirmed liquidating plan of reorganization. As clearly stated in 11 U.S.C. 1123 (1994), "Notwithstanding any otherwise applicable nonbankruptcy law ..." the contents of a confirmed plan may provide for the sale of all or part of the property of the estate. As recognized in In re FCX, Inc., 853 F.2d 1149, 1155 (4th Cir. 1988), cert. denied 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989) (specifically distinguishing In re Schauer, 835 F.2d 1222 (8th Cir. 1987)), Section 1123 is an empowering statute. Noting cases which hold that Section 363 does not enlarge the powers of the trustee over the rights the debtor held pre-petition, the court states:

> Section 1123(a)(5)(D) then does not simply provide a means to exercise the debtor's pre-bankruptcy rights; it enlarges the scope of those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of the estate. In re FCX, Inc., 853 F.2d 1149, 1155 (4th Cir. 1988).

Accordingly, the court approved the validity of an assignment through the terms of a confirmed plan, even though the assignment conflicted with state law prohibitions on assignment. In this case, the assignment to Can Do, Inc. Pension and Profit Sharing Plan was through the provisions of a confirmed liquidating plan, and based on the express provisions of 11 U.S.C. 1123 (1994), those provisions override state law, and the Tennessee Supreme Court must be reversed, In re FCX, Inc., 853 F.2d 1149, 1155 (4th Cir. 1988), cert. denied 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989).

However, an analysis of 11 U.S.C. 363 (1994) indicates that all trustees have the power to transfer assets of the estate, notwithstanding state law, regardless of whether the transfer is in conjunction with a confirmed plan of reorganization.

As stated above, 11 U.S.C. 541 (1994) creates property of the estate notwithstanding state law restricting transfer. The interpretation of the Tennessee Supreme Court in this case, and the 8th Circuit in In re Schauer, 835 F.2d 1222 (8th Cir. 1987), result in a transfer of assets to the trustee which the trustee cannot sell due to state court restrictions. In Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed. 233 (1971), this Court specifically held that state law should not frustrate federal bankruptcy law. The express language of 11 U.S.C. 363 (1994) grants to trustees the power to sell property of the

estate, subject only to notice and hearing. If a non-assignability limitation found in the common law of a state restricts that ability, the estate is left with property it cannot liquidate. This clearly frustrates the purpose of a trustee to maximize a recovery of assets of the estate, and rewards those individuals who are the defendants in claims. The Debtor can no longer bring the claim, since 11 U.S.C. 541 (1994) makes such claims property of the estate regardless of state court restrictions on transfer. But under this analysis, the trustee cannot sell or assign the claim. The only logical interpretation of 11 U.S.C. 363 (1994) is that any property of the estate can be sold or assigned notwithstanding restrictions founded in state common law.

3. The Supremacy Clause , Article 6, Clause 2, of the United States Constitution, prohibits state law from impairing the rights and duties of a bankruptcy trustee through the application of state law.

The Supremacy Clause prohibits state laws from impairing or limiting federal statutes, including bankruptcy statutes, Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed. 233 (1971). Since there is no limitation placed on the power of a trustee to sell or assign property under 11 U.S.C. 363, and an express grant of authority to override state restrictions through a confirmed plan by 11 U.S.C. 1123 (1994), the Tennessee Supreme Court cannot dismiss a case based on a state court prohibition of an assignment of an asset through a final bankruptcy court order rendered in conjunction with a confirmed plan of liquidation. To do so violates the Supremacy Clause.

B. Final Bankruptcy Court Orders must be given full faith and credit in state courts.

As stated, this assignment was by virtue of a final

bankruptcy court order, Appendix 42-53, rendered in conjunction with a confirmed plan of reorganization, Appendix 18-38. Under Article 4 of the United States Constitution, federal court orders must be given full faith an credit by state courts, Hazen Research, Inc. v. Omega Minerals, Inc., 497 F.2d 151 (5th Cir. 1974). Accordingly, based on the final bankruptcy court order, the cause of action was assigned, and that assignment must be given full faith and credit in the state courts in order to allow the assignment to have meaning and enforceability.

C. Retroactive application of a first impression pronouncement of law violates due process under the Fourteenth Amendment to the United States Constitution.

In the opinion filed by the Tennessee Supreme Court (Appendix 65), the court states:

> This case presents a question of first impression in Tennessee: whether or not a legal malpractice claim is assignable. We have determined that sound public policy reasons militate against allowing assignment of legal malpractice actions. We, therefore, reverse the Court of Appeals and dismiss the Complaint. (Appendix 65).

The judgment of a state supreme court as a final statement of law expresses the power of the state, Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (D.C. Va. 1973), affirmed Titus v. Supreme Court of Virginia, 414 U.S. 1034, 94 S.Ct. 533, 38 L.Ed. 327 (1973).

The Fourteenth Amendment to the United States Constitution prohibits states from depriving its citizens of property without due process of law. Due process requires that laws must give fair warning of the legal ramifications of the law and provide legally fixed standards, Giaccio v. State, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

In this case, Mr. Holder's pension plan received an assignment of a malpractice claim by final bankruptcy court order. Three years after the assignment, the Tennessee Supreme Court announced that it determined by reference to cases in other states that assignments of malpractice actions in the state of Tennessee would not be given legal effect. Based on this first impression holding, a law suit filed three years prior to the date of the holding was dismissed.

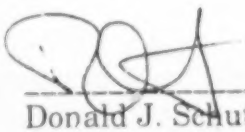
Where a state supreme court announces a legal standard, it is tantamount to the enactment of legislation. Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (D.C. Va. 1973), affirmed Titus v. Supreme Court of Virginia, 414 U.S. 1034, 94 S.Ct. 533, 38 L.Ed. 327 (1973). By the express language of the opinion, Mr. Holder would have no means of determining Tennessee law on this subject on the date the contract was entered, and the retroactive holding resulting in a dismissal of this case thereby violates due process.

Summary and Request for Relief

In summary, based on the foregoing the Petitioner requests this Court to grant its Petition for Writ of Certiorari, to take jurisdiction over this case, and to reverse the Order of the Supreme Court of the State of Tennessee, Can Do, Inc. Pension and Profit Sharing Plan and Successor Plans v. Manier, Herod, Hollabaugh & Smith, P.C., 922 S.W.2d 865 (Tenn. 1996).

Certificate of Service

I hereby certify that a copy of the Petition for Writ of Certiorari and the appendix thereto was served on Robert Lee Trentham, Trabue Sturdivant & Dewitt, Nashville City Center, 25th Floor, 511 Union St., Nashville, Tennessee, 37219-1738, this 1 day of August, 1996.



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Appendix

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Constitution of the United States

Article IV

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Constitution of the United States
Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Constitution of the United States
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against

the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

11 U.S.C. 363 (1994)

Sec. 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then -

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended -

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or
(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless -

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection(b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, trustee may use,

sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section -

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the

burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C § 541 (1994)

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this sub-section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor,or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a

death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of a nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status — or State licensure of the debtor as an educational institution or

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(B) but for the operation of this paragraph, the estate could include such interest only by virtue of section 365 or 544(a)(3) of this title. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the

estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by; the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankrucy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C 1123 (1994)

Sec. 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as -

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an

interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may -

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for -

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the

property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)
	)
GEORGE W. HOLDER, JR.,	) No. 91-07135-GP3-11
	) Chapter 11
Debtor.	) Judge Paine

CHAPTER 11 PLAN

Dated: February 8, 1993 Filed by: Trustee

William Lamar Newport, Trustee in the above-styled bankruptcy proceeding, proposes the following Chapter 11 Plan for the purposes of completing the liquidation and distribution of assets of the bankruptcy estate.

ARTICLE I

Definitions

For all purposes of this Chapter 11 Plan, except as otherwise expressly provided or unless the context otherwise requires, the terms identified in this Article I have the meanings ascribed to them as follows:

(1) "Aggregate Claims Amount" shall mean, with respect to any Class of Claims or group of unclassified claims, the total amount of Allowed Claims and Reserve Claim Amounts in such Class or group as of any particular point in time.

(2) "Allowed" when used with respect to a Claim, other than an Administrative Claim, means (i) a Claim to the extent it is not a Disputed Claim; or (ii) a Disputed Claim as to which an order has been entered resolving the objection and allowing the Claim in a specified amount.

(3) "Bankruptcy Estate" shall mean the estate created by the Chapter 11 Case of George W. Holder, Jr., pursuant to 11 U.S.C. § 541, and administered by the Trustee.

(4) "Bar Date" shall mean October 1, 1992, being the date established by the Court as the deadline for filing Claims in this Case.

(5) "Business Day" shall mean any day other than a Saturday, Sunday or "legal holiday" as that term is defined in Bankruptcy Rule 9006(a).

(6) "Case" shall mean voluntary bankruptcy case No. 391-07135.

(7) "Chapter 11" shall mean Chapter 11 of the Code, 11 U.S.C. §§ 1101-46, as amended.

(8) "Claim" shall be defined as in 11 U.S.C. § 101(4), and shall include any Claim against the Debtor and will sometimes be used, for purposes of the Chapter 11 Plan, interchangeably with the term "Proof of Claim."

(9) "Claimant" is defined the same as "Creditor" and the two terms are used interchangeably.

(10) "Class" shall mean a category of holders of Claims as classified in Article II of this Plan.

(11) "Code" shall mean the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

(12) "Confirmation of the Plan" or "Confirmation" shall mean entry by the Court of an order confirming the Plan in accordance with Chapter 11.

(13) "Court" shall mean the United States Bankruptcy Court or the United States District Court for the Middle District of Tennessee from time to time exercising original jurisdiction under the Code in the Case.

(14) "Creditor" shall be defined as in 11 U.S.C. § 101(9), and shall include any Creditor with respect to the Debtor; used interchangeably with the term "Claimant."

(15) "Debtor" shall mean George W. Holder, Jr.

(16) "Debtor-in-Possession" or similar phrase shall mean the Debtor in his capacity under 11 U.S.C. § 1107 acting in the Case prior to the date that the Trustee was appointed.

(17) "Disallowed," when used with respect to a Claim shall mean any Claim or portion thereof that has been a Disputed Claim and is determined by the Court to be disallowed pursuant to the applicable provisions of the Code, including, without limitation, any Claim disallowed pursuant to Section 502(e) of the Code.

(18) "Disputed," when used with respect to a Claim, shall mean any Claim with regard to which an objection has been filed by the Trustee, the Debtor or any other party in interest prior to the "Objection Deadline".

(19) "Effective Date of the Plan" shall mean the later of (i) the first business day following the 10th day after entry by

the Court of an order confirming this Plan, or (ii) the first business day after such order has become final and unappealable; provided, no appeal of said order is pending; provided, further, the Trustee may waive the condition that no appeal of the order of confirmation be pending by a writing duly executed by the Trustee and filed with the Court on or before the date which but for the pendency of appeal would become the Effective Date of the Plan, and in the event that said condition is timely waived by the Trustee the Plan shall become effective as provided herein notwithstanding the pendency on said date of an appeal or appeals, and in the event that said condition is not timely waived, the Plan shall become effective on the first business day after an appeal is no longer pending.

(20) "Estimated Claim Amount" shall mean, with regard to an unliquidated or contingent Claim in which a precise monetary amount is not apparent from the Debtor's Schedule of Liabilities or the Creditor's Proof of Claim, the maximum potential Allowed Claim that such Creditor shall have for purposes of this Plan. If the Trustee and the affected Creditor can agree upon such amount, they shall jointly file a notice with the Court reflecting the figure. If the Trustee and such Creditor cannot agree on the Estimated Claim Amount prior to the Effective Date of the Plan, the Trustee shall immediately seek a determination by the Court of the Estimated Claim Amount and request that a hearing be held so as not to delay any distributions to Creditors.

(21) "Final Distribution Date" shall mean the date that the last distribution is made to Class 13 Creditors in accordance with Article IV of the Plan.

(22) "Initial Unsecured Claim Distribution Date" shall mean the first business day following the 15th calendar day after the Objection Deadline for Unsecured Claims; provided

that the date may be extended such reasonable period of time as the Trustee deems appropriate if he determines that such extension is administratively necessary to complete the distribution.

(23) "Net Collected Funds" shall mean all funds held by the Trustee at any particular time that have been collected by the Trustee -- from liquidation of assets, recoveries from litigation or otherwise -- which have not been previously paid out by the Trustee during the pendency of the Case and which remain after all funds have been paid as authorized by the Plan, minus the Reserve Administrative Costs.

(24) "Net Sales Proceeds" shall mean, when used in connection with the sale of any particular asset of the Bankruptcy Estate, the total funds derived from the sale of that asset (but not of other assets), minus any taxes, commissions, professional fees or other costs attributable to the sale of such asset.

(25) "Objection Deadline" shall mean the last day that the Trustee, the Debtor or any other party in interest may file an objection to a Claim in order for such Claim to be considered a Disputed Claim for purposes of this Plan. With regard to Priority Claims, such deadline shall be the Effective Date of the Plan. With regard to all other Claims, such deadline shall be the first Business Day following the 30th calendar day after the Effective Date of the Plan.

(26) "Plan" shall mean this Chapter 11 Plan as the same may be modified from time to time in accordance herewith or pursuant to applicable law.

(27) "Priority Claim Distribution Date" shall mean the first business day following the 5th calendar day after the Effective Date of the Plan; provided that the date may be

extended such reasonable period of time as the Trustee deems appropriate if he determines that such extension is administratively necessary to complete the distribution; further provided that the date may be further extended in connection with any particular Claim that is Disputed until the amount of the Claim has been determined.

(28) "Proof of Claim" shall mean the document filed with the Court by a Creditor asserting a Claim in this Case.

(29) "Reserve Administrative Costs" shall mean an amount determined by the Trustee to be the maximum potential cost to the Bankruptcy Estate needed to be reserved for payment of professional fees and expenses, trustee compensation, quarterly fees and miscellaneous administrative expenses necessary to carry out the terms of this Plan.

(30) "Reserve Claim Amount" shall mean the total debt reflected on the Proof of Claim filed by a Creditor with a Disputed Claim unless a different Estimated Claim Amount has been established. In that event, the Estimated Claim Amount shall become the Reserve Claim Amount. In any event, such Reserve Claim Amount shall be the maximum possible claim that such a Creditor shall have for purposes of distribution under this Plan and all distributions applicable to such Reserve Claim amounts shall be held by the Trustee in a separate interest-bearing account pending resolution of the respective Disputed Claims giving rise to the Reserve Claim Amount.

(31) "Schedule of Liabilities" shall mean Schedules A1, A2 and A3 of the Amended Schedule of Assets and Liabilities filed by the Debtor with the Court.

(32) "Trustee" shall mean William Lamar Newport in

his capacity,v as Trustee in the Case or as disbursing agent under the provisions of this Plan after the Effective Date of the Plan.

(33) "Unsecured Claim" shall mean any Claim that is neither secured nor entitled to a priority under the Code or Orders of the Court.

ARTICLE II

Classification of Claims

This Plan reflects the treatment of various unclassified non-voting claims as well as various Classes of Creditors who are eligible to vote on the Plan.

(1) Unclassified Claims: In accordance with § 1123(a)(1) of the Code, certain types of administrative claims and governmental tax claims are described below and are treated under the Plan as set forth in Article III but are not designated as classes of Claims.

A. Professional Fees and Expenses -- All fees and expenses of administration allowed pursuant to 11 U.S.C. § 503 for professional persons who have, with Court approval, been employed by the Trustee.

B. Trustee's Compensation -- Fees and expenses of the Trustee in consideration for his service in that capacity in this Case.

C. U.S. Trustee Quarterly Fees -- Any unpaid quarterly fees imposed by 28 U.S.C. § 1930.

D. Miscellaneous Administrative Expenses -- Post-petition expenses of administration of the Case incurred by

the Debtor-in-Possession or the Trustee that do not fit within categories A, B or C above.

E. Internal Revenue Service -- The unsecured priority tax claim of the Internal Revenue Service.

F. Section 507(a)(7) Priority Tax Claims -- The unsecured priority tax claims of governmental units as defined in § 507(a)(7) of the Code other than the Internal Revenue Service.

(2) Classes of Claims: In accordance with § 1123(a)(1) of the Code, the following classes of Claims have been designated:

A. Class 1 -- Non-Tax Priority Claims -- The Claims of various nongovernment, non-administrative Creditors entitled to priority pursuant to § 507(a)(2), (3), (4), (5), (6) and (8).

B. Class 2 -- Dominion Bank of Middle Tennessee -- Class 2 shall consist of the secured claim of Dominion Bank of Middle Tennessee, collateralized by real estate owned by Humble Properties at 1094 N. Main Street in Cheatham County, Tennessee, and the second secured claim of such Claimant, collateralized by certain property in Davidson County, Tennessee, owned by Coventry Partners.

C. Class 3 -- Fidelity Federal Bank -- Class 3 shall consist of the secured claim of Fidelity Federal Bank, collateralized by certain property owned by Charlotte Properties in Davidson County, Tennessee.

D. Class 4 -- Delta Life and Annuity Company -- Class 4 shall consist of the secured claim of Delta Life and Annuity Company arising out of a debt assumed by Can-Do, Inc., and collateralized by certain real estate in Davidson County,

Tennessee, and the contingent secured claim of such Claimant arising out of a personal guaranty of a debt assumed by Dewel L. Lineberry and collateralized by certain real estate in Sumner County, Tennessee.

E. Class S -- Huntington Ridge Townhouse Homeowners Association, Inc. -- Class 5 consists of the secured claim of Huntington Ridge Townhouse Homeowners Association, Inc., for monthly association dues, collateralized by certain undeveloped real estate known as Huntington Ridge in Davidson County, Tennessee.

F. Class 6 -- Union Planters National Bank -- Class 6 consists of the secured Claim of Union Planters National Bank, collateralized by various judgment liens against various real estate of the Debtor.

G. Class 7 -- River Rest Estates, Inc. -- Class 7 shall consist of the secured claim of River Rest Estates, Inc., collateralized by real estate at Sam Houston Court.

H. Class 8 -- Cellux Converters, Inc. -- Class 8 consists of the secured claim of Cellux Converters, Inc., assigned to it by Sovran Bank and collateralized by (a) real estate at 1907 Sam Houston Court in Davidson County, Tennessee, and (b) a promissory note to the Debtor from Jerry Teal and Teal/Walker Development Corporation, Inc. which is itself secured by certain real estate.

I. Class 9 -- Margaret M. Huff, Trustee for Zane Davis Enterprises, Inc. - Class 9 shall consist of the secured claim of Margaret M. Huff, Trustee for Zane Davis Enterprises, Inc., collateralized by a mechanics' and materialmens' lien against certain real estate on Center Point Road in Sumner County, Tennessee.

J. Class 10 -- Adams and Adams -- Class 10 shall consist of the secured claim of Adams and Adams, collateralized by judgment liens against various properties of the Debtor and recorded within 90 days of the filing of the case.

K. Class 11 -- Gordon S. Brewer-- Class 11 shall consist of the Claim of Gordon S. Brewer based upon an asserted secured interest arising out of an allegation of "constructive ownership" of certain equipment held by the Bankruptcy Estate.

L. Class 12 -- Joe R. Smith -- The Claim of Joe R. Smith as assignee of the Claim of Third National Bank, collateralized by the Debtor's residence and certain property on Old Hickory Boulevard at Hobson Pike.

M. Class 13 -- Unsecured Claims -- The Claims of creditors holding Unsecured Claims.

N. Class 14 -- Barbara Holder-- Class 14 shall consist of the contingent, unliquidated Claim of Barbara Holder.

O. Class 15 -- George W. Holder, Jr. -- the Debtor.

ARTICLE III

Treatment of Classes

The Claims as identified in Article II shall be satisfied in the manner set forth below. The treatment of and the considerations if any, to be received by Creditors holding Claims pursuant to this Plan shall be in full settlement, release and discharge of their respective Claims against the Bankruptcy Estate. (However, such discharge of obligations of the Bankruptcy Estate shall not constitute a discharge of the Debtor.) The treatment shall be as follows:

(1) Unclassified Claims:

A. Professional Fees and Expenses: The administrative claims for professionals employed with Court approval by the Trustee, to the extent not previously paid, shall be paid in full on the Priority Claim Distribution Date or, after allowance by the Court, whichever occurs last. The procedures for allowance of such Claims shall be as follows: (a) Professional seeking payment shall file an application with the Court and provide a detailed description of fees and expenses incurred; (b) Trustee or applicant shall give notice of intent to pay such fees and expenses, with such notice going to the U.S. Trustee, the 10 largest Creditors from Class 13 and any persons specifically requesting, in writing, such notice after Confirmation of the Plan (prior general requests for notices in the Case not being sufficient); (c) in the absence of a written objection within 15 days of the notice, an order shall be submitted to the Court approving the payment; (d) the payment of fees and expense reimbursement shall be made by the Trustee upon the entry of the order; and (e) in the event of objections, a hearing shall be scheduled by the Court. All administrative claimants seeking payment for professional services rendered prior to Confirmation of this Plan must file the application on or before 30 days after the Effective Date of the Plan. Any such applications for services rendered after Confirmation may be filed at appropriate intervals acceptable to the Trustee, and a final application must be filed no later than five days before any date scheduled by the Trustee as the Final Distribution Date.

B. Trustee Compensation -- The Code provides for the Trustee to receive compensation based upon a percentage of distributions up to three percent. Based upon the complexities of the Case and the significant responsibilities of the Trustee in this Case, the Trustee shall receive three percent of all

funds disbursed in his role as Trustee, subject to the accounting review of the U.S. Trustee established herein. Prior to payment of any such compensation based on distribution of funds during the pendency of the Case or pursuant to the terms of the Plan, the Trustee shall notify the U.S. Trustee of the amounts and dates of funds distributed and the intention of the Trustee to pay compensation as set forth herein with a calculation of the intended compensation to be paid. In the event the U.S. Trustee objects to the payment of such compensation based upon the calculations provided, such objection shall be made in writing to the Trustee within 10 days of receipt by the U.S. Trustee of the Trustee's notice. In the absence of such objection, the Trustee's compensation shall be immediately disbursed. If such objection is made and cannot be resolved between the U.S. Trustee and the Trustee, either party may request a hearing to seek a determination by the Court.

C. Quarterly Fees -- Fees incurred pursuant to 28 U.S.C. § 1930 shall be paid in full on or before the Effective Date of the Plan.

D. Miscellaneous Administrative Expenses --- Any miscellaneous administrative expenses incurred prior to Confirmation shall be paid no later than the Initial Distribution Date. Any such expenses incurred after Confirmation shall be paid when incurred or as soon thereafter as it is practicable.

E. Internal Revenue Service -- The Internal Revenue Service shall be authorized to credit $40,000.00 from a 1990 tax credit against the Debtor's priority tax claim, and the remainder of the priority claim in the amount of $54,339.51 shall be paid on the Priority Claim Distribution Date. Such payment to the Internal Revenue Service shall be without prejudice to the Trustee to continue his review of the Debtor's

tax returns for prior years and to seek refunds based upon amended returns if appropriate.

F. Section 507(a)(7) Non- IRS Priority Tax Claims -- The Allowed Unsecured priority tax claims of governmental units other than the Internal Revenue Service shall be paid on the Priority Claim Distribution Date.

(2) Classified Claims.

A. Class 1 -- Non-Tax Priority Claims -- The Trustee is aware of no claims in this Class. However, to the extent of any Allowed Claim in this Class, the holders of Claims shall be paid in full on the Priority Claim Distribution Date.

B. Class 2 -- Dominion Bank of Middle Tennessee -- This Class 2 Claimant shall be given relief from the automatic stay to exercise its rights in any collateral securing the two Claims in this Class. No distribution shall be made on account of this Class, but this shall not affect any rights that Dominion Bank of Middle Tennessee may have in connection with its Unsecured Claim in the amount of $46,972.39, which shall be treated in Class 13.

C. Class 3 -- Fidelity Federal Bank -- The Class 3 Claimant shall be given relief from the automatic stay to exercise its rights in any collateral securing its Claim. No distribution shall be made on account of this Class.

D. Class 4 -- Delta Life and Annuity Company -- This Class 4 Claimant shall be given relief from the automatic stay to exercise its rights in any collateral securing the two Claims in this Class. No distribution shall be made on account of this Class, but this shall not affect any rights that Delta Life and Annuity Company may have in connection with its Unsecured Claim in the amount of $787,073.51, which shall be treated in

Class 13.

E. Class 5 -- Huntington Ridge Townhouse Homeowners Association, Inc. -- The property securing the Claim of the Class 5 Claimant will be sold, and from the Net Sales Proceeds, the Class 5 Claimant will be paid a sum equal to $1,696.00 per month times the number of months of unpaid association dues. No payments will be made to this Class from the date of Confirmation until the property is sold, which shall not exceed a period of six months from the Effective Date.

F. Class 6 -- Union Planters National Bank -- During the pendency of the Case the Class 6 Claimant was paid an agreed-upon amount pursuant to an order of the Court resulting in the execution by the Class 6 Claimant of an assignment to the Trustee of its rights in the judgment liens. No further distribution shall be made to this Claimant, and the Trustee shall record the assignment of the judgment liens and release such liens or exercise the rights under the liens as he deems appropriate in disposing of assets of the Bankruptcy Estate.

G. Class 7 -- River Rest Estates, Inc. -- The property securing the Claim of the Class 7 Claimant will be sold, and from the Net Sales Proceeds, the Class 7 Claimant will be paid a sum equal to $1,040.30, plus $21.00 per month times the number of months between August, 1991, and the date of sale that the monthly maintenance fees for River Rest Estates, Inc. have not been paid.

H. Class 8 -- Cellux Converters, Inc. -- The property at 1907 Sam Houston Court will be sold by the Trustee, and the first $52,500.00 of the Net Proceeds (determined after the payments to the Class 7 Claimant) shall be paid to the Class 8 Claimant. If such sale does not occur within six months of the

Effective Date, the Class 8 Claimant will be paid $52,500.00 at such time. Further, in addition to the $52,500.00 payment, the promissory note of Jerry Teal will be surrendered to this Claimant as of the Effective Date of the Plan. No other distribution shall be made on account of this claim.

I. Class 9 -- Margaret M. Huff, Trustee for Zane Davis Enterprises, Inc. - The property securing the Claim of the Class 9 Claimant will be sold and such Claimant will be paid all Net Proceeds up to the amount of such Claimant's Allowed Secured Claim against the property. This Claimant will receive no further distribution from the Bankruptcy Estate.

J. Class 10 -- Adams and Adams -- The Class 10 Claimant shall receive no distribution as a secured creditor, but its Claim, to the extent it is Allowed, will be treated as a Class 13 Claim. Due to the fact that the judgment liens of Adams and Adams are preferences pursuant to Section 547 of the Code, they shall be deemed void as of the Effective Date of the Plan if this Claimant accepts the Plan. Otherwise, the Trustee will initiate litigation to set aside the liens.

K. Class 11 -- Gordon S. Brewer-- The Class 11 Claimant shall receive no distribution from the Bankruptcy Estate based upon the asserted "constructive ownership" interest in the Debtor's equipment and any purported lien rights claimed by this Claimant shall be extinguished. However, such treatment shall not affect the Unsecured Claim of Gordon S. Brewer in the amount of $35,503.49 to the extent such Claim is Allowed.

L. Class 12 -- Joe R. Smith -- Relief from the automatic stay shall be granted to allow the Class 12 Claimant to exercise his rights in the Debtor's residence. The Class 12 Claimant shall be entitled to no distribution from the Bankruptcy Estate, and the lien against the real estate on Old

Hickory Boulevard at Hobson Pike shall be released. To the extent the Class 12 Claimant does not accept the Plan and consent to release the lien against the Old Hickory Boulevard property, the Trustee will initiate legal proceedings to require a marshalling of the assets and seek to require this Claimant to foreclose on the residence and establish any deficiency Claim arising out of the foreclosure before exercising any rights against the Old Hickory Boulevard property.

M. Class 13 -- Unsecured Claims -- The holders of Allowed Unsecured Claims shall be treated pursuant to Article IV. Any Unsecured Claim that is Disallowed shall receive no distribution under the Plan.

N. Class 14 -- Barbara Holder -- The Class 14 Claimant will receive no distribution under the Plan.

O. Class 15 -- George W. Holder, Jr. -- Class 15 shall receive no distribution under the Plan. Any interest of such claimant in property of the bankruptcy estate shall be terminated and canceled as of the Effective Date of the Plan.

ARTICLE IV

Payment of Allowed Unsecured Claims

Each Claimant holding an Allowed Class 13 Claim will receive, on a pro rata basis on the Initial Unsecured Claim Distribution Date, a percentage of the Net Collected Funds determined as of the Objection Deadline. Such percentage shall be determined by multiplying the amount of such Net Collected Funds times a fraction with a numerator equal to such Claimants' Allowed Claim and with a denominator equal to the Aggregate Claims Amount for Class 13.

Each Claimant with a Disputed Claim in this Class will

have such Claimant's pro rata distribution placed into a designated interest-bearing account held by the Trustee based upon the Reserve Claim Amount of such Claimant's Claim. If the holder of a Disputed Claim has the Claim Allowed in an amount equal to the Reserve Claim Amount, then the amount set aside for such Claimant shall be distributed to such Claimant upon entry of a final order determining the Claim. To the extent the Disputed Claim is Disallowed in full or in part, the portion of the pro rata funds held by the Trustee attributable to the Disallowed Claim shall then be made a part of the Net Collected Funds available for further distributions to holders of Allowed Claims.

After the Initial Unsecured Claim Distribution Date, the Trustee shall make additional interim disbursements every six months provided that the Net Collected Funds equal a total of at least $200,000.00. Such interim disbursements shall be calculated in the same manner as on the Initial Unsecured Claim Distribution Date. Any interim disbursement may be delayed for such reasonable time as the Trustee deems appropriate if significant additional Net Collected Funds are anticipated that will increase the distribution within a relatively short period of time.

A final distribution of any remaining funds available for distribution will be made whenever (a) all Disputed Claims have been either Allowed or Disallowed, (b) all assets of the Bankruptcy Estate have been liquidated, (c) all outstanding litigation in which the Trustee is involved has been concluded and (d) all administrative claims have been paid or determined in an amount sufficient to ascertain with certainty the precise amount of such final distribution.

ARTICLE V

Means for Execution of Plan

The Trustee has already liquidated some assets of the Bankruptcy Estate and recovered some of the funds believed to be reasonably recoverable for the benefit of the Bankruptcy Estate. A significant number of additional assets are yet to be liquidated, and various litigation, collection efforts and avoidance actions remain to be pursued by the Trustee in this Case. The Trustee shall liquidate all assets and complete all recoveries within such time as the Trustee, in the exercise of his best business judgment, deems reasonable, taking into account the particular asset or type of action required to obtain the best recovery for creditors under all existing circumstances. The Trustee shall arrange for payment of funds to be disbursed on the various distribution dates under the Plan. Pending disbursements, the Trustee shall retain all funds of the Bankruptcy Estate in interest-bearing bank accounts pursuant to applicable guidelines of the United States Trustee.

It is anticipated that the Trustee will be called upon to exercise his best business judgment on numerous occasions in settling Claims, compromising litigation and determining the proper method of disposing of assets and appropriate sales prices. The following procedure will be used in connection with any compromise and settlement of a Claim, litigation or contested matter and in disposing of assets: (a) The Trustee shall give written notice to holders of Class 13 Allowed or Disputed Claims with such notice giving a summary of the agreement reached regarding a compromise and settlement or, in the case of a proposed sale, the general information regarding the asset to be sold, buyer, price, commissions, expected costs of sale, method of sale and timing of sale; (b) any holder of a Class 13 Allowed or Disputed Claim shall have the right to file an objection to the proposed action, but such objection must be filed with the Court and served upon the Trustee within 15 days of the date of the Trustee's notice;

(c) unless objections are filed and served by Creditors holding Class 13 Allowed or Disputed Claims totalling at least one-third in dollar amount of the Aggregate Claims Amount, the Trustee shall be authorized to complete the proposed transaction and, to the extent necessary or appropriate, shall submit an order to the Court reflecting the approval of such transaction; (d) in determining the percentage of objecting Creditors, the Trustee shall base his calculations using the total dollar amount of holders of Allowed Claims and Reserve Claim Amounts objecting to the proposed action divided by the Aggregate Claim Amount as of the deadline for objections to the proposed action.

All Court-approved professionals who have assisted the Trustee during the pendency of the Case will continue to work with the Trustee in carrying out his duties under the Plan. Compensation of such professionals for services rendered and expense reimbursement will be governed by the provisions set forth under Article III, Section (1)A.

ARTICLE VI

Miscellaneous Provisions

1. Modification of the Plan -- The Trustee may make any adjustment, remedy any defect or omission, or reconcile any inconsistencies in the plan after confirmation, provided that said modification does not materially or adversely affect the interest of any claimants, and further provided that such modification is deemed necessary to carry out the purposes and effect of the Plan and insure implementation of the Plan.

2. Waiver of Discharge -- An Order has been entered by the Court reflecting that the Debtor has waived his discharge and that "the debtor shall not be granted a discharge" in this Case. Accordingly, confirmation of the Plan

will not result in the discharge of the Debtor's obligations to Creditors.

3. Executory Contracts -- All executory contracts not previously assumed by the Trustee prior to confirmation shall be deemed rejected.

4. Trustee's Post-Confirmation Role -- The Trustee shall continue to act as an escrow and disbursement agent after the Effective Date of the Plan in this Case and shall have the right to take any actions necessary to pursue objections to Claims, initiate any actions authorized by the Code, and otherwise execute this Plan.

5. Unclaimed Disbursements -- In the event that the Trustee is unable to distribute funds to the holder of an Allowed Unsecured Claim after making reasonable effort to send the distribution to the last known address of such Creditor, and if such distribution is returned unclaimed or the payee has failed to cash the check within 120 days after the Final Distribution Date, then the Trustee shall stop payment on any check remaining unpaid at such time. The total of all such unclaimed funds shall be paid into the Court, provided that the total amount of such unclaimed funds is not sufficient to justify the administrative costs of a further distribution to Creditors, such determination being left to the discretion of the Trustee. In the event the funds are paid into the Court, the funds shall be disposed of under 11 U.S.C. § 2041, et seq.

6. Destruction of Records -- The Trustee will retain business records of the Debtor until the Final Distribution Date, and the expense of such storage shall be a Miscellaneous Administrative Expense to be timely paid by the Trustee. As soon after the Final Distribution Date as practical, the Trustee shall make arrangements to dispose of the remaining business records, having reserved sufficient

funds to cover the costs of such disposition. Any records requested by the Debtor may be turned over to the Debtor after the Final Distribution Date.

7. Retention of Jurisdiction -- The Court will retain jurisdiction until all Claims have been determined, all outstanding contested matters have been resolved, all administrative claims have been allowed or disallowed, and the case is closed as provided by the Bankruptcy Code and Rules.

8. Closing of the Case -- The case will be closed on the earliest date possible after the distributions required to be made under this Plan have been made, and all contested matters, applications or motions have been resolved.

DATED: 2/8, 1993

__/S_____
William Lamar Newport
Trustee for Bankruptcy Estate of
George W. Holder, Jr.
303 Church Street, Suite 100
(615) 726-1766

__/S_____
HEISKELL, DONELSON, BEARMAN,
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Attorneys for Chapter 11 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)	
	)	
GEORGE W. HOLDER, JR.,	)	CASE NO.91-07135
	)	-GP3-11
	)	CHAPTER 11
Debtor.	)	JUDGE PAINE
	)	

ORDER CONFIRMING FIRST AMENDED
CHAPTER 11 PLAN

This matter came before the Court on April 19, 1993, for a confirmation hearing on the First Amended Chapter 11 Plan filed by the Chapter 11 Trustee on March 18, 1993 (the "Plan). Also before the Court were the objections to confirmation filed by the Debtor and Adams & Adams.

In connection with the objections, the Trustee announced at the hearing several modifications to the Plan. Also, the Court concluded that one additional modification was required in order for confirmation to be approved. The Court finds that these modifications, described below, are such that they do not materially change the Plan in a manner that would require any further notice to creditors other than as provided by the service of this order approving confirmation. With the modifications reflected herein, the Court found the unresolved objections to be without merit. The Court's findings of fact and conclusions of law announced from the bench overruling such objections are hereby incorporated as

if set forth fully herein.

Based upon the representations of counsel and the testimony and proof presented to the Court at the hearing, it is ORDERED as follows:

1. The Plan is modified as set forth below:

a. The sale and disposition of property held by the bankruptcy estate shall be completed within two years from the Effective Date of the Plan, subject to the right of the Trustee to seek an extension for good cause shown.

b. The provisions in Article V of the Plan allowing the Trustee to complete certain types of proposed transactions in the absence of a certain minimum level of objections shall be modified to reflect that the dollar amount minimum objection figure shall be one-fourth instead of one-third, with the method of determining such calculation otherwise remaining the same.

c. Article V is further modified to reflect that, in the event a party objecting to a sale under the Plan comes forward during the objection period with a cash offer with a greater net return to the bankruptcy estate than the sale proposed by the Trustee, the Trustee shall be authorized to complete the transaction with the higher bidder without the necessity for entry of any further order of the Courts assuming that there are no other outstanding objections meeting the requisite minimum claim amount.

2. Upon the motion of Adams & Adams, its ballot is deemed to be timely filed. The Ballot Summary presented by the Trustee and made an exhibit at the hearing is otherwise accepted as an accurate reflection of the voting by creditors in the case.

3. With the modifications noted herein, the necessary requirements for confirmation, as set forth in 11 U.S.C. § 1129, have been satisfied with regard to the Plan.

ACCORDINGLY, the Plan filed by the Trustee on March 18, 1993, as modified herein, is hereby approved.

IT IS SO ORDERED.

____/S_____
GEORGE C. PAINE, II
United States Bankruptcy Court

SUBMITTED FOR ENTRY:

_____/S_____
Randal S. Mashburn
HEISKELL, DONELSON, BEARMAN
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(615) 256-0815

Attorneys for William Lamar Newport
Chapter 11 Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)
GEORGE W. HOLDER, JR.,	)No. 91-07135-GP3-11
	) CHAPTER 11
Debtor.	) JUDGE PAINE

AGREED ORDER APPROVING DISPOSITION OF CERTAIN ASSETS AND RESOLVING VARIOUS DISPUTES AMONG THE CHAPTER 11 TRUSTEE, THE DEBTOR, MARY EVELYN HOLDER, AND THE CAN-DO PROFIT SHARING PLAN AND TRUST, COMBINED WITH NOTICE OF COMPROMISE AND SETTLEMENT

As reflected by the signatures of the parties or their counsel below, it appears to the Court that an agreement has been reached regarding the transfer and disposition of certain assets and a compromise and settlement among various parties involved in the above-styled bankruptcy proceeding, including William Lamar Newport, the Chapter 11 Trustee; George W. Holder, Jr., the Debtor in the above-styled Chapter 11 case; Mary Evelyn Holder, the daughter of the Debtor and a defendant in certain litigation referenced herein; and Gary Blackburn, Trustee for the Can-Do, Inc. Profit Sharing Plan and Trust. It appears. to the Court that good cause exists for the entry of this Agreed Order upon the terms and conditions forth herein and it further appears notice of the compromise and settlement and the opportunity for objections is properly provided in paragraph of this Agreed Order.

ACCORDINGLY, it is stipulated by the signatories to

this Agreed Order and the Court hereby ORDERS as follows:

BACKGROUND

1. For purposes of notice, the Chapter 11 Trustee provides the "Background" information, although such "Background" information is contested and shall not be deemed an admission by any party of any facts.

2. George W. Holder, Jr. (sometimes referred to herein as "Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on July 24, 1991. On November 13, 1991, William Lamar Newport was appointed Chapter 11 Trustee and the appointment was approved by the Court.

3. On April 23, 1992, the Chapter 11 Trustee filed an adversary proceeding against various parties, including Mary Evelyn Holder. Based on that complaint, a subsequent amended complaint and a subsequent consolidated action, the Chapter 11 Trustee sought to set aside certain alleged fraudulent transfers pursuant to 11 U.S.C. § 548 and certain unauthorized post-petition transfers pursuant to 11 U.S.C. § 549. The Chapter 11 Trustee also sought a declaratory judgment that certain property constituted property of the bankruptcy estate pursuant to 11 U.S.C. § 541. Further, the Chapter 11 Trustee sought the imposition of an injunction, a constructive trust and other relief.

4. The allegations in the complaint related to five specific items of personal and real property, including:

(a) Improved real property at 400 Wayside Court, Nashville, Davidson County, Tennessee;

(b) Improved real property at 1016 40th Avenue, North Nashville, Davidson County, Tennessee;

(c) A 39-foot Ocean Alexander boat, Coast Guard Official No. 900579;

(d) 100 shares of stock in Eagle Packaging Co., Inc., representing 50 percent of all issued and outstanding shares

of the corporation; and

(e) A 25 percent partnership interest in Hot Hits Compact Disc, a Tennessee general partnership.

5. The Chapter 11 Trustee ultimately prevailed in the adversary proceeding, and the Court set aside the transfers of the various properties referenced above and declared the property to be property of the bankruptcy estate. The Chapter 11 Trustee also obtained a judgment against Mary Evelyn Holder in the amount of $119,798.97. The judgment has been appealed by the Debtor and Mary Evelyn Holder and that case is currently pending in the United States District Court for the Middle District of Tennessee.

6. Pursuant to an agreed order previously entered in this case, the Chapter 11 Trustee previously sold stock in Can-Do, Inc., in a sale that was closed on June 5, 1992. Prior to the sale of the stock of Can-Do, Inc., the Chapter 11 Trustee took action to appoint a new Trustee of the Can-Do Profit Sharing Plan and Trust (the "Pension Fund") after the Debtor was terminated from that position by Can-Do, Inc. A complaint was instituted in Davidson County Chancery Court Case No. 92-1388-III, which resulted in the appointment of Gary Blackburn as Pension Fund Trustee. The Debtor currently has pending a motion to set aside the order appointing the Pension Fund Trustee.

7. The Chapter 11 Trustee later filed suit against the Pension Fund Trustee seeking the recovery of approximately $107,000.00 arising out of an alleged post-petition transfer from the Debtor to the Pension Fund. That case is currently pending as Adversary Proceeding No. 393-0004A.

8. The Debtor, acting pro se, recently filed with the Bankruptcy Court a request for termination of the Chapter 11 Trustee's appointment plus other relief generally relating to allegations regarding actions of the Chapter 11 Trustee during the pendency of this case. The vast majority of those allegations are directly or indirectly related to the Pension Fund, the litigation against Mary Evelyn Holder and other

matters expressly addressed by this Agreed Order.

9. In addition to issues that have precipitated specific litigation as referenced above, various other disputes have arisen relating to the parties to this Agreed Order. An agreement has now been reached among these parties that will resolve a significant number of disputes, including the litigation referenced above. The Chapter 11 Trustee believes that this compromise and settlement is in the best interest of the bankruptcy estate. Based upon the foregoing the parties have agreed and the Court hereby ORDERS as follows:

TERMS OF ORDER

10. Attached hereto are copies of the following:

11. Exhibit A -- An agreed order in District Court Case No. 3:93-0072 dismissing with prejudice the appeal of the judgment obtained by the Chapter 11 Trustee in Adversary Proceeding Case Nos. 392-0165A and 392-0328A.

12. Exhibit B -- An agreed order in Adversary Proceeding No. 393-0004A dismissing with prejudice the lawsuit brought by the Chapter 11 Trustee against the Pension Fund Trustee (the "Pension Fund Litigation").

13. Exhibit C -- An order of the Bankruptcy Court approving the acknowledgement by the Chapter 11 Trustee that any residual value in the Pension Fund (or any successor or transferee of the Pension Fund) remaining after payment of amounts required to be paid under this Agreed Order does not constitute property of the bankruptcy estate and that the Chapter 11 Trustee is deemed to have released any claim, cause of action, or property interest against the Pension Fund upon the consummation of this Agreed Order.

14. Exhibit D -- An order in Davidson Count) Chancery Court Case No. 92-1388-III approving the withdrawal with prejudice of the motion filed by the Debtor to set aside the order appointing Gary Blackburn as Pension Fund Trustee.

15. Exhibit E -- An order in Bankruptcy Court

approving the withdrawal of the Debtor's Request for Termination of Trustee's Appointment, Termination of Trustee's Employment. Return of all Monies Paid to Trustee and His Attorneys and the Abrogation of All Handled by Them Respectfully and the Reinstatement of Debtor as Debtor in Possession (the "Motion to Terminate Trustee").

16. The original of each of the above-referenced exhibits shall be held by the respective counsel for the parties who are given the responsibility for submitting the various orders to the appropriate courts as set forth herein.

17. If no objections are filed to this Agreed Order by the close of business on June 4, 1993, the Pension Fund Trustee shall immediately transfer to the Chapter 11 Trustee $175,000.00 by cashier's check, certified funds, or wire transfer and shall transfer all remaining interest and assets of George W. Holder, Jr., as beneficiary, to Holder's successor pension plan, the Horizon Pension and Profit Sharing Plan, John M. Vinson, Trustee. The Pension Plan Trustee is authorized to retain sufficient cash reserves to pay outstanding beneficiary claims and other anticipated expenses through the closing and termination of the Pension Fund. The Pension Fund Trustee shall complete the pending foreclosure proceeding related to the Teal property in Williamson County, Tennessee, and shall transfer all proceeds thereof to John M. Vinson, as Trustee, within 7 days of the closing of the sale of the property. In the event that the sale is delayed past May 31, 1993, Holder reserves the option to either direct the transfer and assignment of the promissory note to John M. Vinson, as Trustee, or in the alternative, to authorize the Pension Fund Trustee to complete the proceeding and transfer the proceeds to John M. Vinson, as Trustee, upon completion. Should there be a substitute trustee for the proceeding, the expenses of substitution shall be paid from the trust corpus. In the event an objection to this Agreed Order is filed, the $175,000.00 referenced above shall be paid to the Chapter 11 Trustee on the first business day following the 10th day (as calculated by

Bankruptcy Rule 9006) after an order is entered denying the objection or otherwise approving the settlement, said order having become final and nonappealable. If an order is entered denying any such objection or otherwise approving the settlement but an appeal is filed, the funds shall be paid to the Trustee after an appropriate appellate order has been entered and become final and nonappealable resolving the matter in favor of approval of the compromise. Alternatively, the Trustee may waive in writing the condition that no appeal of the order is pending, provided that no stay pending appeal has been granted in this matter. In the event of such waiver, the $175,000.00 settlement amount shall be immediately paid by the Pension Fund Trustee as set forth above.

18. Upon the timely receipt of the $175,000.00 settlement amount by the Trustee, pursuant to the preceding paragraph, the following shall occur:

A. Counsel for the Chapter 11 Trustee shall immediately submit the original of Exhibit A to the U.S. District Court, and George Holder and Mary Evelyn Holder shall be deemed to have released any claims or rights to the property that is subject to the litigation giving rise to the appeal.

B. Counsel for the Chapter 11 Trustee shall immediately submit the original of Exhibit B to the Bankruptcy Court, and the Trustee shall be deemed to have waived any rights to recover the funds that are the subject of the Pension Fund Litigation.

C. Counsel for the Chapter 11 Trustee shall immediately submit the original of Exhibit C to the Bankruptcy Court, and the Trustee shall be deemed to have waived any further rights to the Pension Fund (or any successor thereto) as property of the estate or otherwise.

D. Counsel for the Chapter 11 Trustee shall immediately submit the original of Exhibit D to the Chancery Court, and George Holder shall waive any further rights he may have to contest his termination as trustee of the Pension

Fund or to contest the appointment of Gary Blackburn as Pension Fund Trustee. However, such waiver shall not constitute a dismissal of nor a waiver of any rights the Debtor may have to contest actions taken by the Pension Fund Trustee after his appointment. Notwithstanding the foregoing, the Debtor acknowledges that the Pension Fund Trustee has the legal capacity to execute this Agreed Order and that the Debtor consents to such execution.

E. Counsel for George Holder shall submit the original of Exhibit E to the Bankruptcy Court. Such withdrawal shall be without prejudice as to any matters not expressly resolved by the terms of the settlement reflected in this Agreed Order. However, notwithstanding the foregoing, Debtor agrees that any further objections by the Debtor to actions that have been taken by the Trustee will be made only after appropriate review and investigation by Bankruptcy Court approved counsel for the Debtor and compliance with Bankruptcy Rule 9011 and only after being signed by Debtor's bankruptcy counsel as previously approved by this Court.

F. The Trustee shall cause to be transferred to the Pension Fund, by Trustee's deed, bill of sale, assignment or other appropriate document, such right, title and interest as the Trustee may have in the following assets:

(1) All interests, without limitation, in Hot Hits;

(2) Stock interest in Eagle Packaging, Inc.;

(3) Judgment against Mary Evelyn Holder;

(4) Right of survivorship, or any other rights, in Debtor's residence at 5300 Lancelot Drive;

(5) Personal property identified on Exhibit F;

(6) Any personal property of Debtor that may still be in possession of Can-Do, Inc.; and

(7) Any cause of action or right to payment the bankruptcy estate may have against the following:

(a) Wayne G. Glasgow;

(b) Murfreesboro Road Partners;

(c) Harold and Sheila Nipper;

(d) Ernest Medlin;

(e) C. Kinian Cosner, Jr., or Manier, Herod, Hollabaugh & Smith: and

(f) Adams & Adams -- provided, however, that the assignment to the Pension Fund of any such cause of action or right to payment is limited to any recoveries that may be obtained in excess of any setoff or recoupment rights that may be exercised by the bankruptcy estate to disallow or reduce the claim of Adams & Adams against the bankruptcy estate.

G. The Pension Fund Trustee shall release the bankruptcy estate from any claim, cause of action or right to payment of any kind that it may have against the bankruptcy estate and shall execute any document reasonably requested by the Trustee acknowledging such release.

H. The Chapter 11 Trustee shall abandon any interest he may have in the leased Mercedes vehicle currently held by the Debtor, provided that such abandonment shall not result in any liability to the bankruptcy estate.

19. It is acknowledged by the Debtor that the actions herein could result in adverse tax implications for himself individually or the Pension Fund in which he is the primary beneficiary. Neither the Pension Fund Trustee nor the Chapter 11 Trustee shall have any responsibility for such consequences, and the Debtor has agreed to this Agreed Order after personal review and advice of counsel.

20. Nothing herein shall be construed in any manner as limiting the right of the Chapter 11 Trustee (a) to continue discovery efforts regarding the Debtor; (b) to reconvene ongoing Bankruptcy Rule 2004 examinations of the Debtor; (c) to further investigate the pre-petition or post-petition activities of the Debtor: (d) to pursue any appropriate recoveries of assets, avoidances of transfers or other claims, causes of action or other rights of any kind in connection with the Debtor or any other party except for matters expressly

resolved herein as to parties hereto; or (e) to initiate any appropriate proceeding in any court or other forum as the Chapter 11 Trustee exercises his rights and responsibilities under the United States Bankruptcy Code, other applicable law and the terms of the confirmed Amended Chapter 11 Plan in this case.

21. Nothing in paragraph 20 shall be deemed to expand any rights of the Chapter 11 Trustee or to constitute a stipulation or waiver of any right of George Holder not expressly resolved herein. Nothing herein shall be construed in any manner as limiting or expanding any right of George Holder, as Debtor, to pursue any discovery or cause of action, to object to the actions of any party in interest, or to pursue any other rights of any kind except for matters expressly resolved herein as to parties hereto.

22. This document may be signed in counterparts and will be effect and enforceable despite signatures submitted by facsimile transmission so long as pages carrying original signatures are filed with the Court within five business days of entry of this Agreed Order.

NOTICE AND OPPORTUNITY FOR OBJECTION

23. All applicable notice requirements shall be satisfied by counsel for the Trustee serving a copy of this Agreed Order upon all parties entitled to notice under Article V of the Amended Chapter 11 Plan confirmed on April 29, 1993. Such copies shall be served by the Trustee within three business days of the entry of this Agreed Order, and an appropriate certificate of service shall be filed with the Court. Any party objecting to any of the terms of the Agreed Order must file, by June A, 1993, a written objection with the Court and serve a copy of the objection on parties and counsel listed below. In the event any such objection is filed, a hearing will be held on the 15th day of June, 1993, at 9:00 a.m. in Room 216, Customs House, Nashville, Tennessee. If no objections

are filed within the specified time, this Agreed Order shall immediately become final, effective as of the date of entry.

DATED this l 8 day of May, 1993
/S
GEORGE C. PAINE, II
United States Bankruptcy Court

APPROVED FOR ENTRY:

/S
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Plan and Trust

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY
PART ONE

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND As TRUSTEE FOR GEORGE W. HOLDER, JR.,	)
V.	) NO. 93-1519-I) JURY DEMAND
MANIER, HEROD, HOLLABAUGH & SMITH a professional corporation, C. KINIAN COSNER, JR, E. ROWAN LEATHERS, III	)

ORDER

This action is before the Court on defendants' motion to dismiss plaintiffs' first amended complaint for legal malpractice. Defendants' contend that plaintiffs' amended complaint, brought in the name of a pension and profit-sharing plan as the assignee of a claim for legal malpractice, should be dismissed because claims for legal malpractice are not assignable as a matter of law.

This case presents an issue of first impression in Tennessee: whether a cause of action for legal malpractice is assignable under Tennessee law? There is apparently a split of authority among the State courts that have considered the issue. This Court finds the Supreme Court of Indiana case,

Picadilly, Inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991), to be persuasive in this matter.

Originally, at common law, very rarely could one assign a chose in action. Id. at 339. However, the non-assignability of a chose in action has become so restricted in modern times that it is now the exception to the rule of free assignment. Id. at 340.

Although the usual test for assignability has been a question of whether or not the chose in action survives the death of the assignor, survival is not the only test. Id. at 341. Today, public policy also plays a role in such a determination. Id.

Based upon a review of the issue and the applicable law before this Court, the Court finds that the assignment of a legal malpractice claim in Tennessee is void and invalid as against public policy because it constitutes champerty and maintenance and would frustrate, if not entirely endanger, the attorney-client relationship.

IT IS, THEREFORE, ORDERED that the defendants' motion to dismiss is **GRANTED**. Thus, this action is **DISMISSED**. Since the Court did not consider matters outside the pleadings, the Court did not find it necessary to treat defendants' motion to dismiss as a motion for summary judgment. Costs taxed to plaintiffs.

/S
IRVIN H. KILCREASE, JR.
CHANCELLOR

cc: Robert L. Trentham
Mark Tyler Seitz
Richard Militana

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND AS TRUSTEE FOR GEORGE W. HOLDER, JR.,	)
Plaintiffs/Appellants,	) Appeal No. 01-A-09404-CH-00200
VS.	) Davidson Chancery No. 93-15191
MANIER, HEROD, HOLLABAUGH & SMITH, a professional corporation, C.KINIAN COSNER,JR.,and H. ROWAN LEATHERS, III,	)
Defendants/Appellees.	)

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE

THE HONORABLE IRVIN H. KILCREASE, CHANCELLOR

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REVERSED IN PART;
MODIFIED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J.
FRANKS, J.

OPINION

The plaintiffs sued a law firm and two of its individual attorneys on a malpractice claim assigned to one of the plaintiffs by a trustee in bankruptcy. The Chancery Court of Davidson County dismissed the claim on the ground that an assignment of a legal malpractice claim constituted champerty and maintenance and was void as against public policy. We reverse the judgment below as to one of the attorneys and the law firm and remand the cause for consideration of the other issues raised in the pleadings. We dismiss the action as to the other individual attorney since the assignment did not include any claim against him.

I.

The defendants had allegedly mismanaged the legal affairs of George W. Holder, Jr., driving him into bankruptcy and ruining him financially. As amended, the complaint filed in the chancery court also alleged that Horizon Pension and Profit Sharing Plan was the legal successor to Can Do, Inc. Profit Sharing Plan and Trust (Can Do, Inc.); that George W. Holder, Jr. was the principal beneficiary of the plan; and that the trustee of George W. Holder, Jr.'s estate in bankruptcy had assigned to Can Do, Inc. any cause of action or right to payment the bankruptcy estate had against the law firm and the individual attorneys.[1]

The defendants filed a motion to dismiss pursuant to Tenn. R. Civ. Pro.12.02(6) alleging that the complaint failed to state a cause of action on which relief could be granted because:

The Amended Complaint brought in the name of a purported assignee of a claim for legal malpractice must be dismissed because the alleged claim for legal malpractice, if any, is personal to George W. Holder, Jr. and cannot as a matter of law be assigned.

The chancellor granted the motion and dismissed the complaint.[2]

II.

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[1]The record from the bankruptcy court, however, conclusively shows that the assignment did not include any claim against H. Rowan Leathers, III.

[2]The original motion to dismiss also raised issues concerning the plaintiff's standing to bring the action. Since the chancellor did not address these issues we will not address them here.

A claim for legal malpractice is a chose in action, i.e., "a right to receive or recover a debt, or money," *Moran v. Adkerson*, 168 Tenn. 372, 79 S.W.2d 44 (1935), or "a right to receive or recover a debt, demand, or damages on a cause of action ex contractu or for a tort or omission of a duty," *Black's Law Dictionary*, 219 (5th ed. 1979).

At one time under the common law, an assignment of a chose in action was illegal. *Hutsell v. Citizens Nat. Bank 166 Tenn.* 598, 64 S.W.2d 188 (1933). The reason given for the rule was that an assignment constituted champerty and maintenance. *Picadilly, Inc. v. Raikos*, 552 N.E2d 338 (Ind.1991).

Champerty is a bargain with a plaintiff or defendant in a cause to divide the matter sued for, if they prevail,whereupon the champertor is to carry on the party's suit at his own expense. (Citations omitted). Maintenance is an offidous intermeddling in a suit which no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defeat it. (Citations omitted).

Spicer v. Jarrett, 61 Tenn. 454 (1873).

Slowly the courts and legislatures reversed the old rule, making it the exception now. In 1899 the legislature repealed most of the code dealing with champerty and maintenance. What remains is the portion of Section 66 of the Acts of 1821 dealing with champertous sales of real property. See Tenn. Code Ann. § 66- 4-201, et seq. And in *Staub v. Sewanee Coal, Coke & Land Co.*, 140 Tenn. 505, 205 S.W. 320 (1918), the court held that a suit would not be dismissed just because there was a champertors contract between the plaintiff and his attorney or between the plaintiff and another layman.

Today all contract-based choses in action, except for those purely personal in nature, are assignable. See Tenn. Code Ann. § 47-50-102; *Berger v. .Paalzow*, 40 Tenn. App. 153, 289 S.W.2d 861 (1956); *Kivek v. Mayes*, 49 Tenn. App. 272, 354 S.W.2d 492 (1961). Tort-based choses in action are assignable if they arise out of injuries to property. *East Tenn. GA. & VA.R.R. v. Henderson ex rel. Mathis*, 69 Tenn.1 (1878); *Haymes v. Halliday*, 151 Tenn. 115, 268 S.W. 130 (1924). See also Tenn. Code Ann. § 20-5-120 (allowing assignment of an insured's claim against his insurance company for the failure to settle a claim within the policy limits.) Torts for personal injuries and for wrongs done to the person, reputation, or feelings of the injured party are still unassignable. See Annot. Assignability of Claim for Personal Injury or Death, 40 ALR2d 500.

Another factor that has frequently been considered in determining the assignability of a chose in action for tort is whether it survives the death of the assignor. *Haymes v. Halliday*, 151 Tenn. 115, 268 S.W. 130 (1924). This consideration probably goes back to an English statute, 4 Ed. 111, ch. 7, which allowed an executor to sue for injuries to personal property occurring before the decedent's death. Courts took the view that the executor was the assignee of the decedent's chose in action. *Picadilly, Inc v. Raikos*, 582 N.E.2d 338 (Ind. 1991). The statute is a part of the Tennessee common law. *Haymes v. Halliday*, 151 Tenn. 115, 268 S.W.130 (1924). But, while a tort-based chose in action must survive in order to be assigned, the converse is not true. Every chose in action that does survive is not assignable. If that were true most tort-based claims for personal injuries would be assignable. See Tenn. Code Ann. § 20-5-102.

As we view the present controversy a cause of action for legal malpractice meets all the requirements for

assignability. Whether it is viewed as arising out of tort or contract, it is an action for injury to property, *Hedlund Mfg. Co. v. Weiser, Stapler and Spivak*, 539 A.2d 357 (Pa. 1988); *Thurston v. Continental Casualty*, 567 A.2d 922 (Me. 1989), and it survives the death of the assignor. Tenn. Code Ann. § 20-5-102.

Some states, however, have disallowed the assignment of legal malpractice claims on the basis of public policy.[3] Balancing the factors favoring assignability against the unfavorable, the courts in those states have found greater weight on the unfavorable side. One of the leading cases establishing this position is *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976) in which the court said:

The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members

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[3]*Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83(1976); *Coffey v. Jefferson County Bd. Of Educ.*, 756 S.W.2d 155 (KY.Ct.App. 1988); *Joos v. Drillock*, 127 Mich.App. 99. 338 M.W.2d 736 (1983); *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114 (Ct. App. 1984); *Washington. Fireman's Fund Ins.*, 459 So.2d 1148 (Fla.Dist.Ct.App. 1984); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982); *Christison v. Jones*, 83 Ill.App.3d 334, 39 Ill.Dec. 560, 405 N.E.2d 8 (1980).

of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Goodley v. Wank & Wank, Inc., 62 Cal.App.3d at 397, 133 Cal.Rptr. at 87.

In *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991), the Indiana Supreme Court followed the California cases and found that the assignability of legal malpractice claims weakened the client-lawyer relationship. The court concluded that lawyers would be less than zealous in representing their clients if they knew the client could assign a malpractice claim to a third party - especially to the former adversary, who would have felt the sting of the defendant's zealous advocacy. The court also concluded that clients would not be willing to disclose all information to a lawyer if they knew it could be repeated in a subsequent malpractice action - which the client had assigned to a third party. We fail to see the logic in either argument.

In addition to these reasons, the court found an objectionable role-reversal in Picadilly that a rule of non-assignment would avoid. In that case the claim for malpractice had been assigned by the judgment debtor (the original defendant) to the judgment debtor (the original plaintiff). This realignment of the parties resulted in the original plaintiff saying in the malpractice case, "I obtained a larger judgment than I was entitled to in the first trial because of the

malpractice of the defendant's lawyer, but I should be able to collect it all by taking an assignment of the malpractice claim from my former adversary." We agree that such a claim should not be allowed, but an answer that bans the assignment of all legal malpractice claims is too broad and too simplistic.

Other states have taken the opposite view In *Hedlund Mfg. Co. v. Weiser, Stapler and Spivak*, 539 A.2d 357 (Pa. 1988), the court said: "We will not allow the concept of the attorney-client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice. When the attorney has caused harm to his or her client, there is no relationship that remains to be protected." 539 A.2d at 359. See also *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977); *American Hemisphere Marine Agencies, Inc. v. Kreis*, 40 Misc. 2d 1090, 244 N.Y.S.2d 602 (N.Y. Sup. Ct. 1963); *Thurston v. Continental Casualty*, 567 A.2d 922 (Me. 1989).

As our Supreme Court said in *Smith v. Gore*, 728 S.W.2d 738 (Tenn.1987), the public policy of the state is to be found in its constitution, statutes, judicial decisions and the applicable rules of common law. From the constitutional provision stating that the courts shall be open, Art. 1 § 17, the statutes passed relating to assignments, Tenn. Code Ann. §§ 47-5-102, 29-36-1 04, 20-5120, and the numerous cases changing the common law rule against assignments, we are convinced that the public policy of this state favors the free assignment of choses in action - except where the thing assigned is purely personal, such as a contract for personal services, or a cause of action for personal injuries. In the present case, therefore, the contract for legal services would not have been assignable, but the action for injury to property as a result of breach of that contract is assignable.

We are also concerned with the public perception of a rule to the contrary. Rather than helping the image of the legal profession, a rule of non-assignability would give the impression that the profession has something to hide, that the courts are taking care of their own. A more favorable image will be projected by an acknowledgement that this profession, like any other, must face its problems and answer its accusers. Vindication after a full airing of the facts is a much better result than the suspicion that would follow a suppression of the facts.

The judgment of the court below is reversed as to Kinian C. Cosner, Jr. and the law firm of Manier, Herod, Hollabaugh and Smith, and the cause is remanded to the Chancery Court of Davidson County for further proceedings. A judgment will be entered here dismissing the claim against H. Rowan Leathers, III. Since the chancellor did not address the standing problem we will not address it here. That question shall remain open for further consideration. Tax the costs on appeal to the appellees.

/S
BEN H. CANTRELL, JUDGE

CONCUR:

/S
HENRY F. TODD, PRESIDING JUDGE

/S
HERSCHEL P. FRANKS, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND AS A TRUSTEE FOR GEORGE W. HOLDER, JR.,	) FOR PUBLICATION))))
Plaintiff-Appellee,	) DAVIDSON) CHANCERY
Vs.	)
	) HON. IRVIN) KILCREASE
MANIER, HEROD, HOLLABAUGH & SMITH, a professional corporation, C. KINIAN COSNER, JR., and H. ROWAN LEATHERS, III,	) CHANCELLOR)))
Defendants-Appellants.	) No. 01-S-01-9501-CH-00013

For Appellants:	For Appellee:
Robert L. Trentharn Mark Tyler Seitz TRABUE, STURDIVANT & DEWITT Nashville, Tennessee	Alfred H. Knight WILLIS & KNIGHT Nashville,Tennessee

This case presents a question of first impression in Tennessee: whether or not a legal malpractice claim is assignable. We have determined that sound public policy reasons militate against allowing assignment of legal malpractice actions. We, therefore, reverse the Court of Appeals and dismiss the complaint.

BACKGROUND

This appeal arises from the trial court's grant of the defendant law firm's motion to dismiss the complaint for failure to state a claim. Accordingly, the facts as alleged in the complaint must be taken as true, and are as follows.

George W. Holder, Jr., employed the defendant law firm, Manier, Herod, Hollabaugh and Smith, to perform certain legal services for him. Later, Holder individually filed a voluntary bankruptcy petition. Holder owned all the stock in Can Do, Inc. and was the primary beneficiary of and served as trustee of the Can Do, Inc. Pension and Profit Sharing Plan.

The bankruptcy trustee, William L. Newport, transferred to the Can Do, Inc. Pension and Profit Sharing Plan certain assets, including an assignment of "any cause of action or right to payment the bankruptcy estate may have against the following . . . C. Kinian Cosner, Jr. And Manier, Herod, Hollabaugh and Smith."

The trial court dismissed the complaint, because "the assignment of a legal malpractice claim in Tennessee is void and invalid as against public policy because it constitutes champerty and maintenance and would frustrate, if not entirely endanger, the attorney -client relationship."

The Court of Appeals reversed concluding that a legal malpractice cause of action survives the death of the assignor and therefore is assignable, and adopted the minority view that assignment of such claims does not violate public policy.

We granted the defendants' application to consider this important question of first impression in this State. For the reasons articulated below, we have concluded that legal

malpractice claims are not assignable.

ASSIGNMENT

Because a legal malpractice claim is a chose in action, we begin our analysis by reviewing the assignability of choses in action. With few exceptions, at early common law, a chose in action, which is a right of a proceeding in a court of law to procure payment of a sum of money or to recover a debt, was not assignable. Black's Law Dictionary, 241 (6th ed. 1990); Moran v. Adkerson, 168 Tenn. 372, 79 S.W.2d 44 (1935). The rule of nonassignability was so strictly construed that it applied even though the original promise was made to the promisee and his assigns. Hutsell v. Citizens' Nat. Bank, 166 Tenn. 598, 64 S.W.2d 188 (1933).

One reason cited to support the rule of nonassignability was that personal rights are nontransferable. See Picadilly, inc. v. Raikos, 582 N.E.2d 338 (Ind. 1991). However, the major purpose of the rule was to prevent champerty and maintenance. In Tennessee, "champerty" has been defined as "a bargain with a plaintiff or defendant in a cause to divide the matter sued for, if they prevail, whereupon the champertor is to carry on the party's suit at his own expense;" whereas, "Maintenance" has been defined as "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defeat it." Spicer v. Jarrett, 61 Tenn. 454, 457 (1873) (citations omitted).

The rule of nonassignability began to gradually erode over time as the public need to expand the quantity of transferable property in commerce increased. Under modern statutes and decisions, the assignability of a chose in action is now the general rule, and nonassignability the exception, 6A C.J.S., Assignments §§ 6 and 7 (1975). For example, in

Tennessee, any contract based chose in action, except those involving matters purely personal in nature, is assignable. See Tenn. Code Ann. § 47-50-102 (1995);Berger v. Paallzow, 40 Tenn. App. 153, 289 S.W.2d 861 (1956). Tort actions involving injuries to property are also assignable,East Tenn G. & V.R.R. v. Henderson, 69 Tenn. 1 (1878); Tenn. Code Ann. § 20-5-120 (1994), while tort actions involving personal injuries and wrongs done to the person, reputation, or feelings of the injured party continue to be unassignable. See Annotation, Assignability of Claim for Personal Injury or Death, 40 A.L.R.2d 500 (1975); 6A C.J.S. § 7, Assignments (1975).

In the absence of a statute, courts determining whether a chose in action is assignable generally apply the traditional common law test-whether the action would survive the death of the assignor and pass to the personal representative. See e.g., Haymes v. Halliday, 151 Tenn. 115, 268 S.W. 130 (1925). For example, in this case, the Court of Appeals applied that traditional survivability test and determined that legal malpractice actions survive the death of the assignor and are assignable.

Although a chose in action must survive to be assignable, not every action that survives is assignable. For example, claims for personal injuries survive, pursuant to Tenn. Code Ann. § 20-5-102 (1994), but generally are not assignable.

In modern times, the common law test of determining the issue of assignability solely by whether the claim survives the assignor's death seems outdated and misplaced. Other state courts have experienced difficulty in applying the survival test and have approached this issue by considering factors such as public policy considerations, which vary depending upon the particular type of action under

examination. Joos v. Drillock, 127 Mich. App. 99, 338 N.W.2d 736, 738 (1983).

Public policy is, in fact, the primary consideration upon which courts from other jurisdictions have focused in determining the assignability of a legal malpractice action. For example, the Indiana Supreme Court stated:

Today, it seems anachronistic to resolve the issue of the assignability of a legal malpractice claim by deciding whether such a claim would survive the client's death . . . . As is sometimes the case with the common law, the rule has outlived the reason for its creation. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of the centuries the custom, belief or necessity disappears, but the rule remains. Where such is the case, this Court has been willing to reexamine the basis of the rule.

Assignment should be permitted or prohibited based on the effect it will likely have on modern society, and the legal system in particular. Picadilly, Inc. v. Raikos, 582 at 341 (Internal citations and quotations omitted).

We agree with the Indiana Supreme Court that in resolving the question of assignability of legal malpractice actions, public policy considerations, rather than the traditional survivability test, should guide the analysis. Indeed, it is particularly appropriate for this Court to examine the public policy considerations that bear upon this question as we have exclusive original jurisdiction over matters relating to the practice of law. Petition of Burson, 909 S.W.2d 768 (Tenn. 1995). Likewise, we conclude that resolution of the question should not turn on whether a claim for legal malpractice is classified as a breach of contract claim or a personal injury claim. Wagener v. McDonald, 509 N.W.2d. 188, 190 (Minn.App. 1993). Rather than straining to fit the

claim into a category, we think the better approach is to resolve the question on public policy grounds.

Employing that analysis, a majority of jurisdictions have concluded that public policy considerations militate against allowing assignment of legal malpractice actions. Francis M. Dougherty, Annotation, Assignability of Claim for Legal Malpractice, 40 A.L.R. 4Th 684 (1985 & Supp. 1995); Picadilly, Inc. v. Raikos, supra; Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson, 250 Kan. 490, 827 P.2d 758 (1992); Earth Science Laboratories, Inc. v. Adkins & Wondra, P.C., 246 Neb. 798, 523 N.W.2d 254 (1994); Chaffee v. Smith, 98 Nev. 222, 645 P.2d 966 (1982); Schroeder v. Hudgins, 142 Ariz. 395, 690 P.2d 114 (App.1984); Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); Roberts v. Holland & Hart, 857 P.2d 492 (Colo.App. 1993); Washington v. Fireman's Fund Ins. Co., 459 So.2d 1148 (Fla.App.1984); Christison v. Jones, 83 Ill.App.3d 334, 39 Ill.Dec. 560, 405 N.E.2d 8 (1980); Coffey v. Jefferson County Bd. Of Educ., 756 S.W.2d 155 (Ky.App.1988); Joos v. Drillock, supra; Wagener v. McDonald, supra; City of Garland v. Booth, 895 S.W.2d 766 (Tex.App.1995); Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves, 709 F.Supp. 44 (D.Conn.1989), aff'd 929 F.2d 103 (2nd Cir.1999); Scarlett v. Barnes, (W.D.Mo.1990); contra Thurston v. Continental Cas. Co., 567 A.2d 922 (Me.1989); Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977), overruled on other grounds Lancaster v. Royal Ins. Co., 302 Or. 62, 726 P.2d 371 (1986); Hedlund Mfg.Co., Inc. v. Weiser, Stapler & Spivak, 517 Pa. 522, 539 A.2d 357 (1988); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 Misc.2d 1090, 244 N.Y.S.2d 602 (N.Y.Sup.1963).

The many public policy reasons underlying these courts' rejection of assignability of legal malpractice claims was perhaps best summarized by the california appellate court in Goodley, which was the first to flatly confront the

issue. There, the court focused on the unique character of legal services, the personal nature of the attorney's duty to the client, and the confidentiality of the attorney-client relationship.

The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client. Id., 133 Cal.Rptr. At 87.

We generally agree with the Goodley court and conclude that assignment of legal malpractice actions would both endanger the attorney client relationship and commercialize legal malpractice lawsuits. We are particularly concerned that the relationship between an attorney and c remain a fiduciary relationship of the very highest character. As a result of that relationship, the attorney owes the client

not only the duty to use skill, prudence and diligence int he rendition of service, but also the duty to act loyally towards the client and to maintain client confidences. Tenn.Sup.Ct.R. 8, Canons 4 and 5. These rules and their enforcement by this Court protect the public, and a violation may result in disciplinary action, as well as a legal malpractice claim. See also Wagener v. McDonald, 509 N.W.2d at 191. Allowing free assignment would be a disservice to the public by compromising both the attorney's duty of loyalty and the duty of confidentiality, resulting in a weakened attorney-client relationship.

As the Indiana Supreme Court recognized, "[a]n adversary might well make a favorable settlement offer to a judgment-proof financially strapped client in exchange for the assignment of that client's right to bring a malpractice claim against h attorney. Lawyers involved in such negotiations would quickly realize that the interests of their clients were incompatible with their own self-interest." Picadilly, Inc. v. Raikos, 582 N.E.2d at 343; City of Garland v. Booth, 895 S.W.2d at 770. The risk that allowing assignments of claims would impair an attorney's loyalty would be present therefore, not only in those cases in which a client assigned a malpractice claim, but in all other cases as well.

Moreover, assignment would compromise the duty of confidentiality. Whenever an attorney is sued by a client for legal malpractice, the attorney is permitted to reveal confidential client information reasonably necessary to establish a defense, Tenn. Sup. Ct. R. 8, DR 4-101(C)(4). So long as the client brings the malpractice claim, the client has the power to drop the lawsuit to avoid the disclosure of embarrassing confidential communications. Id. Once a legal malpractice claim is assigned, however, the client loses control of the litigation. The assignee controls the claim and may have little or no concern for the client's sensitivities. The

client could thereby be harmed and such disclosures would foster disrespect for the attorney client relationship in general. Picadilly, Inc. v. Raikos, 582 N.E.2d at 343-44; Wagener v. McDonald, 509 N.W.2d at 192.

Finally, in our view, the commercialization of legal malpractice claims that would be fostered by allowing assignment is inimical to the legal profession and the administration of justice. "Unlike any other commercial transaction, the client-lawyer relationship is structured to function within an adversarial legal system. In order to operate within this system, the relationship must do more than bind together a client and a lawyer. It must also work to repel attacks from the legal adversaries. Those who are not privy to the relationship are often purposefully excluded because they are pursuing interests adverse to the client's interest." Picadilly, Inc. v. Raikos, 582 N.E.2d at 343-44. Assignment would undermine the fundamental structure and function of the relationship and create a risk of collusion that must not be countenanced. City of Garland v. Booth, 895 S.W.2d at 770; Wagener v. McDonald, 509 N.W.2d at 191. Accordingly, we conclude that considerations of public policy prohibit the assignment of legal malpractice claims in Tennessee.

CONCLUSION

Because we have determined that the public policy of this State should prohibit the assignment of legal malpractice actions, the judgment of the Court of Appeals is reversed, and the judgment of the trial court dismissing this action is reinstated. Costs of this appeal are taxed to the plaintiff-appellee, Can Do, Inc., for which execution may issue if necessary.

/S
RILEY ANDERSON,

CHIEF JUSTICE

CONCUR:

Drowota, Reid, Birch, and White, JJ.

No. 96-210

In The

Supreme Court of the United States

October Term, 1995

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND AS A TRUSTEE FOR GEORGE W. HOLDER, JR.,

Petitioner,

vs.

MANIER, HEROD, HOLLABAUGH & SMITH, a professional corporation, and C. KINIAN COSNER, JR.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

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20 pp

PARTIES TO THIS PROCEEDING

The only Respondents before the Court are Manier, Herod, Hollabaugh & Smith, a professional corporation, and C. Kinian Cosner, Jr. The Petition for Writ of Certiorari incorrectly identifies H. Rowan Leathers, III as a Respondent. The Petitioner's claim against H. Rowan Leathers, III was dismissed by the decision of the Tennessee Court of Appeals dated October 19, 1994. (Petition at Appendix 58 n.1, 64). The claim against Mr. Leathers was dismissed because that particular claim was not included in the assignment which purportedly conveyed George W. Holder, Jr.'s legal malpractice claim to the Petitioner. In the Tennessee Supreme Court, the Petitioner did not seek review of the dismissal of the case against H. Rowan Leathers, III, and the Tennessee Supreme Court did not reverse that portion of the Court of Appeals' decision. Because the dismissal of H. Rowan Leathers, III was not appealed to the Tennessee Supreme Court, he is no longer a party to this case.

The Respondent Manier, Herod, Hollabaugh & Smith is a wholly-owned professional corporation without any subsidiaries or parent companies.

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The Respondents, Manier, Herod, Hollabaugh & Smith, P.C. and C. Kinian Cosner, Jr., submit the following brief demonstrating why the Court should deny the Petition for Writ of Certiorari seeking review of the decision of the Tennessee Supreme Court.

STATEMENT OF JURISDICTION

Because the Petitioner failed to raise any federal questions in the Tennessee courts, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257. Supreme Court Rule 14.1(g)(i) requires a Petitioner to refer specifically to those portions of the state court record where the federal question sought to be reviewed "was timely and properly raised. . . . " The Petition omits the specific citations required by this Rule for the simple reason that none of the issues now raised by the Petitioner was ever presented to or decided by the Tennessee courts. For the reasons discussed more fully below, at pp. 4-5, the Court lacks jurisdiction over the federal questions now advanced by the Petitioner.

STATEMENT OF THE CASE

A. Introduction

The Petitioner seeks review of the result in this case on grounds that were never presented to or decided by the Tennessee courts. This case was argued and decided below on one narrow question: Does the common law of Tennessee permit legal malpractice cases to be assigned? In deciding this issue against the Petitioner, the Tennessee courts relied exclusively on Tennessee public policy grounds, without having an opportunity to consider the federal questions belatedly advanced by the Petitioner. The Petitioner's arguments come far too late, and the Court should deny the Petition on that basis alone.

In any event, the Court should decline to review a decision of a state supreme court that is entirely consistent with existing federal law. This case simply does not present the federal Constitutional and statutory conflicts now argued by the Petitioner.

B. Course of Proceedings Below

This is a legal malpractice case which originated in a Tennessee trial court. Before 1991, the Respondent attorneys represented George W. Holder, Jr. In 1991, Mr. Holder filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Tennessee. (Petition at 4). Under the provisions of 11 U.S.C. § 541, the filing of Mr. Holder's bankruptcy petition created an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). When Mr. Holder filed his bankruptcy petition, any causes of action against the Respondent law firm that arose before the petition was filed became property of the bankruptcy estate.

During the course of Mr. Holder's bankruptcy proceedings, a Chapter 11 Trustee was appointed by the court to administer the estate. (Petition at Appendix 18). The Trustee filed a Chapter 11 Plan which was confirmed by an order dated April 29, 1993 (Petition at Appendix 39). Neither the plan nor the order confirming the plan contained any reference whatsoever to the disposition of Mr. Holder's malpractice claim against his former attorneys. While the plan contained a general provision authorizing the Trustee to liquidate all assets and compromise all claims according to his judgment, it did not specifically provide for the disposition of Mr. Holder's malpractice claim. (Petition at Appendix 35-36).

In the course of the bankruptcy proceeding, a number of disputes arose among various parties, including the Chapter 11 Trustee, Mr. Holder, the trustee of a pension and profit sharing plan of which Mr. Holder was the beneficiary, and Mr. Holder's daughter. These disputes were resolved by an agreed order entered on May 18, 1993. (Petition at Appendix 42-53). The agreed order purported to assign "any cause of action or right to payment the bankruptcy estate may have" against Mr. Holder's former attorneys to the Can-Do, Inc. Pension and Profit Sharing Plan and its successor plans, individually and as Trustee for Mr. Holder (Petition at Appendix 48). The pension plan is the Petitioner now before the Court.

The pension plan filed the present legal malpractice action on May 25, 1993. The trial court dismissed the claim, holding that the purported assignment of the claim to the pension plan was void under Tennessee law. (Petition at Appendix 54-55). The Petitioner did not argue, and the trial court did not address, the issue of whether any federal law required the Tennessee courts to recognize the assignment. On appeal to the Tennessee Court of Appeals, the Petitioner again failed to challenge the trial court's decision on any federal grounds. Although the Tennessee Court of Appeals reversed the trial court's dismissal, it did so solely on the basis of Tennessee public policy. (Petition at Appendix 57-64). The Respondent attorneys appealed to the Tennessee Supreme Court, which reversed the Court of Appeals and held "that the public policy of this State should prohibit the assignment of legal malpractice actions . . ." (Petition at Appendix 73). The Tennessee Supreme Court's decision contains no reference to the federal statutes and constitutional provisions now cited by the Petitioner, and the Petitioner did not present those arguments to that court. Thus, the Petitioner did not assert any of the federal questions it now advances during any stage of the state court proceedings.

REASONS FOR DENYING THE WRIT

I.

BECAUSE THE PETITIONER FAILED TO RAISE ITS FEDERAL CLAIMS IN THE TENNESSEE COURTS, THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITIONER'S ARGUMENTS.

It is well-established that this Court will not review the final judgments of state courts unless a federal question has been both raised and decided in the state courts. *Yee v. City of Escondido*, 503 U.S. 519, 522-33 (1992). In *Yee*, this Court held that, in reviewing the judgments of state courts, "the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." *Id.* at 533 This Court will not review the final judgment of a state court unless the record shows that the federal claims were adequately presented in the state system. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987). *See also Webb v. Webb*, 451 U.S. 493, 496-97 (1981). If the opinion of a state court fails to pass on a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, (1983) (quoting *Street v. New York*, 934 U.S. 576, 582 (1969)). Similarly, although Tennessee law permits appellate courts to consider any issue of law, "review generally extends only to those issues presented for review." Tennessee Rule of Appellate Procedure 13(b).

The Petitioner should not be permitted to lie in wait until this penultimate moment of the litigation before advancing the federal questions it now asks the Court to consider. The Petitioner's failure to assert any of the arguments now presented

during three levels of review by the Tennessee courts should preclude it from asserting those arguments in this Court. Although the Petitioner's new legal arguments are entirely meritless, the Court should deny the Petition on jurisdictional grounds alone.

II.

THE DECISION OF THE TENNESSEE SUPREME COURT IN THIS CASE IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE FEDERAL COURTS CITED BY THE PETITIONER.

A. Because the Tennessee Supreme Court never even referred to any federal issues in deciding this case, the court's decision does not conflict with existing federal law.

Under the longstanding rules of this Court, "a petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. One of the factors considered by this Court in ruling on a petition is whether "a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of United States Court of Appeals." Supreme Court Rule 10(b). In the present case, the Petitioner argues that its Petition should be granted because the Tennessee Supreme Court's decision somehow conflicts with the federal courts' prior interpretations of the United States Bankruptcy Code.

In fact, however, the Tennessee Supreme Court did not decide this case on the basis of any federal law and made no holdings which depended upon an interpretation of federal law. Because the Tennessee Supreme Court failed to decide any federal question, the court's decision by definition does not conflict with the various federal cases cited by the Petitioners.

B. Even accepting the Petitioner's impermissibly broad interpretation of the Tennessee Supreme Court's decision in this case, that decision does not conflict with relevant federal precedent.

It is undisputed that, when George W. Holder, Jr. filed his bankruptcy petition, the present legal malpractice claim became property of the bankruptcy estate pursuant to 11 U.S.C. § 541. A bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case . . . " 11 U.S.C. § 541(a)(1). Such interests include any causes of action possessed by the debtor at the commencement of the bankruptcy proceeding. *In re Cottrell*, 876 F.2d 540, 542-43 (6th Cir. 1989). In dismissing the Petitioner's malpractice claim, the Tennessee Supreme Court did *not* hold that the claim failed to become a part of Mr. Holder's bankruptcy estate. This case, therefore, does not present the issue of whether or not state law may properly preclude a tort claim from becoming property of the estate.

Instead, the Tennessee Supreme Court simply held that the present cause of action could not be pursued by the Petitioner, a third-party assignee who purportedly obtained ownership of the malpractice claim from the bankruptcy trustee. The Petitioner urges this Court to accept this case on the ground that the Tennessee Supreme Court's decision somehow ran afoul of the Bankruptcy Code and should therefore be reversed. The Petitioner's argument rests upon two fundamental errors, one of which is a misinterpretation of bankruptcy law, and the other of which is based on a misunderstanding of the facts of this case.

First, the Petitioner argues that the property of the estate acquired by a trustee pursuant to 11 U.S.C. § 541 may be disposed of under the authority of 11 U.S.C. § 363 without regard to any state law. This argument flies in the face of well-

established precedent. Second, the Petitioner argues that the present claim was acquired by the Petitioner through a confirmed plan and that, pursuant to 11 U.S.C. § 1123, Tennessee law can not impair such an assignment. This argument conveniently ignores the fact that the malpractice claim was not transferred to the Petitioner through a confirmed Chapter 11 plan.

While all property of the debtor does become property of the estate, 11 U.S.C. § 363 grants the trustee of the estate the authority to sell or dispose of estate property "[only] if the debtors would have had the same right under state law." *In re Schauer*, 835 F.2d 1222, 1225 (8th Cir. 1987). Under this well-recognized principle, the bankruptcy estate simply stands in the stead of the debtor, acquiring the rights in property previously enjoyed by the debtor and subject to the same limitations that would have applied to the debtor under state law. *See In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2nd Cir. 1989); *In re Draughon Training College & Institute, Inc.*, 119 B.R. 927, 933 (Bankr. W.D. La. 1990). The Bankruptcy Code "was written with the expectation that it would be applied in the context of state law and that federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests." *In re Roach*, 824 F.2d 1370, 1374 (3rd Cir. 1987). If state law restricts a debtor's ability to dispose of an asset, therefore, the bankruptcy estate is similarly restricted in disposing of the asset pursuant to 11 U.S.C. § 363.

The Tennessee Supreme Court's holding in this case is entirely consistent with the holding of federal courts that have considered similar issues. For example, the case of *Integrated Solutions, Inc. v. Service Support Specialities*, 193 B.R. 722 (Bankr. D.N.J. 1996) is directly on point. In that case, the plaintiff had purchased the assets of a bankruptcy debtor, including all pre-petition claims and causes of action. The

plaintiff then brought suit on various tort actions that had accrued to the debtor under New Jersey law. The defendant moved for summary judgment, arguing that because New Jersey law prohibited the assignment of tort claims, the bankruptcy trustee's transfer of those claims was invalid. In response, the plaintiff/assignee asserted that applying the state law restrictions on the assignability of the tort claims "would compel a trustee to litigate or abandon all claims, arguably frustrating the Bankruptcy Code's pervading policy — the expeditious liquidation of the estate." *Id.* at 727.

The Bankruptcy Court rejected this argument, holding that, although the bankruptcy trustee acquired the causes of action as property of the estate, the claims were still subject to the restrictions on assignment imposed by New Jersey law. *Id.* at 729. The court noted that 11 U.S.C. § 363(b)(1) did not expressly authorize the trustee to sell property in a way which violated applicable state law transfer restrictions. The court observed that, in those instances in the Bankruptcy Code in which Congress intended to displace such state law, Congress employed specific language to that effect. *Id.* Thus, the court held that "New Jersey's limitation on the assignability of tort causes of action defines and qualifies the scope of a proprietary interest. Since New Jersey public policy restricted [the debtor's] power to alienate its tort causes of action, the nature of the interests that passed to the estate pursuant to § 541 was similarly circumscribed" *Id.*

The *Integrated Solutions* holding is consistent with the Eighth Circuit's holding in *In re Schauer*, 835 F.2d 1222 (8th Cir. 1987). In that case, the bankruptcy trustee argued that "federal bankruptcy law preempts state law and thus the trustee's power to transfer property of [a] federal bankruptcy estate may not be restricted by state law or contract law." *Id.* at 1224. The Eighth Circuit found this argument to lack merit, because there was no

conflict between 11 U.S.C. § 363(b)(1) and those state laws that define the debtor's rights in property. Section 363 is simply an enabling statute giving the trustee the authority to sell or dispose of property "if the debtors would have had the same right under state law." *Id.* at 1225. *See also In re Professional Bar Co.*, 537 F.2d 339, 340 (9th Cir. 1976) (holding that the trustee of a bankruptcy estate takes property subject to the same restrictions applicable before bankruptcy).

In the present case, the Petitioner argues that the Tennessee Supreme Court's holding conflicts with the holding of the Fourth Circuit in *In re FCX, Inc.*, 853 F.2d 1149 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). In fact, however, the *FCX* decision is entirely consistent with the result in this case. The *FCX* court held that, when an asset is disposed of pursuant to 11 U.S.C. § 1123, in some instances the trustee can dispose of the asset without regard to state law restrictions on the transfer. According to the court, § 1123, unlike § 363, is an "empowering statute" granting the trustee broader powers to dispose of property. *Id.* at 1155 Thus, the *FCX* court specifically distinguished a property transfer made pursuant to § 363 from a transfer made pursuant to § 1123.

The distinction between *FCX* and the present case is readily apparent. Contrary to the Petitioner's argument, the legal malpractice claim in the present case was not transferred through the confirmed plan pursuant to the provisions of 11 U.S.C. § 1123. Mr. Holder's confirmed plan contains no reference whatsoever to the malpractice claim. (Petition at Appendix 18-38). The trustee's transfer of the legal malpractice claim was accomplished, not through the plan, but by means of an agreed order resolving disputes among various parties. (Petition at Appendix 42-53). This order was entered after the plan had been confirmed and was entirely distinct from the plan. Thus, this case does not present an issue of what limits state law may impose on the distribution of assets through a confirmed bankruptcy plan.

The Tennessee Supreme Court's opinion contains no discussion of or holdings concerning the issues now raised by the Petitioner, who failed to raise those questions in the Tennessee courts. Even adopting the generous interpretation of the lower court's decision urged by the Petitioner, however, that decision simply does not conflict with any federal law. The Petition should be denied.

III.

BECAUSE THE DECISION OF THE TENNESSEE SUPREME COURT DID NOT DIRECTLY INVALIDATE ANY ORDER OF A FEDERAL COURT, THIS CASE DOES NOT PRESENT AN ISSUE CONCERNING THE FULL FAITH AND CREDIT TO BE AFFORDED THE JUDGMENTS OF FEDERAL COURTS.

The petitioner asserts that the Tennessee Supreme Court's decision in this case failed to accord full faith and credit to an order of a federal court. (Petition at 12-13). In fact, however, the Tennessee Supreme Court's opinion does not directly invalidate or call into question the order of the Bankruptcy Court purporting to assign the malpractice claim. As set forth above, the bankruptcy estate succeeded only to those rights formerly possessed by the debtor. The Bankruptcy Court's assignment did not explicitly address the issue of whether Tennessee law prohibited a transfer of the malpractice claim. Although the Tennessee Supreme Court's decision had an indirect effect on the ultimate effectiveness of the Bankruptcy Court order, such an indirect impact does not give rise to a Constitutional issue of sufficient importance to justify review by this Court.

Moreover, it is questionable whether or not the present Respondents would have had standing to appeal the Bankruptcy Court's order assigning the Petitioner's malpractice claim. *See*

Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3rd Cir. 1995) (quoting *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983)) (holding that right to appeal bankruptcy order limited to those whose interests are "directly affected"). In fact, when confronted with facts strikingly similar to the present case, one court concluded that the risk of being named as a defendant at some future date by an assignee of a debtor's tort claim would not be enough to give the potential defendant standing to challenge the assignment. *Integrated Solutions, Inc. v. Service Support Specialties*, 193 BR 722, 726 (Bankr. D.N.J. 1996). Because the Respondents likely would have been unable to challenge the assignment in Bankruptcy Court, the present case is the proper forum in which to decide the issue of whether the assignment was allowable under Tennessee law. The Bankruptcy Court never decided that issue, and the Tennessee Supreme Court's decision does not directly disturb any action of the Bankruptcy Court.

IV.

BECAUSE DUE PROCESS DOES NOT PROHIBIT A STATE SUPREME COURT FROM RETROSPECTIVELY APPLYING A NEW RULE OF COMMON LAW, THE PETITIONER'S ARGUMENT IN THAT REGARD SHOULD BE REJECTED.

The Petitioner asserts that the Tennessee Supreme Court's holding that legal malpractice cases cannot be assigned violated the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution. It is not surprising that the Petitioner fails to cite any authority for the novel proposition that a state high court cannot change state common law and apply it to the case in which the change is announced.

The case law on retrospectivity and due process lends absolutely no support to the Petitioner's argument. The Due

Process Clause prohibits retrospective legal holdings or legislation only in those rare cases where the consequences are particularly "harsh and oppressive." *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (citing *Welch v. Henry*, 305 U.S. 134, 147 (1938)). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (stating that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"). In order to be unconstitutional, a retrospective law or legal holding must be "wholly unexpected" and "disruptive." *See In re U.S. Financial, Inc.*, 594 F.2d 1275, 1281 (9th Cir. 1979). In the present case, the Tennessee Supreme Court decided a case of first impression in accordance with the rule observed in a majority of jurisdictions. (Petition at Appendix 70). The court's holding was hardly "unexpected" or unforeseeable.

It would be particularly inappropriate to find a state supreme court's holding unconstitutional in an instance where, as in the present case, the state court is deciding an issue of pure state common law. Even in criminal cases, the United States Constitution does not prohibit retrospective application of new interpretations of state law. *See Camitsch v. Risley*, 705 F.2d 351, 355 (9th Cir. 1983). There is simply no authority supporting the Petitioner's extraordinarily broad interpretation of the Due Process Clause, and this Court should not grant review on that issue.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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